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No. 2412

United States
Circuit Court of Appeals

For the Ninth Circuit.

**SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY, a Corporation,**

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.


**Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.**

Filed

JUL - 1 1914

F. D. Monckton,

Clerk,



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No. 2412

United States
Circuit Court of Appeals
For the Ninth Circuit.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY, a Corporation,
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vs.
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Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

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cancelled matter appearing in
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Names and Addresses of Attorneys.

**For Plaintiff in Error, San Pedro, Los Angeles &
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**PENNEL CHERRINGTON, Esq., 502-4 Pa-
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fornia;**

**A. S. HALSTED, Esq., 502-4 Pacific Electric
Building, Los Angeles, California;**

**W. F. PALMER, Esq., 502-4 Pacific Electric
Building, Los Angeles, California, and**

**F. R. McNAMEE, Esq., 502-4 Pacific Electric
Building, Los Angeles, California.**

**For Defendant in Error, The United States of Amer-
ica:**

**ALBERT SCHOONOVER, Esq., U. S. Attor-
ney, Los Angeles, California;**

**MONROE C. LIST, Esq., Special Assistant
U. S. Attorney, c/o Interstate Commerce
Commission, Washington, D. C.;**

**HARRY R. ARCHIBALD, Esq., Assistant
U. S. Attorney, Los Angeles, California.**

[3*]

*Page-number appearing at foot of page of original certified Record.

*In the United States District Court for the Southern
District of California, Southern Division.*

(Consolidated.)

No. 106—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,
Defendant.

No. 243—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,
Defendant.

Writ of Error [Original].

United States of America,—ss.

The President of the United States, to the Hon.
OLIN WELLBORN, Judge of the United
States District Court for the Southern District
of California, Southern Division, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is in
the said District Court before you, between San
Pedro, Los Angeles & Salt Lake Railroad Company,
plaintiff in error, and The United States of Amer-
ica, defendant in error, a manifest error hath hap-

pened, to the damage of San Pedro, Los Angeles & Salt Lake Railroad Company, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that [4] you have the same at San Francisco, in the State of California, where said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 3d day of April, 1914.

[Seal]

WM. M. VAN DYKE,

Clerk of the United States District Court for the Southern District of California, Southern Division.

By Chas. N. Williams,
Deputy Clerk.

Allowed this 3d day of April, 1914.

OLIN WELLBORN,
United States Judge.

4 *San Pedro etc. Railroad Company*

I hereby certify that a copy of the within Writ of Error was on the 3d day of April, 1914, lodged in the clerk's office of the said United States District Court for the Southern District of California, Southern Division, for said defendant in error.

WM. M. VAN DYKE,
Clerk U. S. District Court, Southern Dist. of California, So. Division.

By Chas. N. Williams,
Deputy Clerk. [5]

[Endorsed]: Nos. 106 and 243 Civil. U. S. District Court, Ninth District, Southern District of California. The United States of America vs. San Pedro, Los Angeles & Salt Lake Railroad Co., Defendant. Writ of Error. Filed Apr. 3, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [6]

*In the United States District Court for the Southern
District of California, Southern Division.*

(Consolidated.)

No. 106—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,
Defendant.

No. 243—Civil.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,

Defendant.

Citation in Error [Original].

United States of America, to the United States of
America, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, thirty days from and after the day this citation bears date, pursuant to Writ of Error filed in the clerk's office of the United States District Court for the Southern District of California, Southern Division, sitting at Los Angeles, wherein San Pedro, Los Angeles & Salt Lake Railroad Company, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Hon. OLIN WELLBORN, Judge of the United States District Court, this 3d day of April, 1914.

OLIN WELLBORN,
U. S. District Judge. [7]

Service of the within Citation is hereby admitted, and a copy thereof accepted, this 3d day of April, 1914.

ALBERT SCHOONOVER,
HARRY R. ARCHBALD,
Attorneys for Plaintiff. [8]

[Endorsed]: Nos. 106 and 243 Civil. U. S. District Court, Ninth District, Southern District of California. The United States of America vs. San Pedro, Los Angeles & Salt Lake Railroad Co. Citation in Error. Filed Apr. 3, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [9]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

(Consolidated.)

No. 106—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,
Defendant.

No. 243—Civil.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,

Defendant. [10]

[Complaint in Case No. 106.]

*In the District Court of the United States for the
Southern District of California, Southern Di-
vision.*

No. —.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,

Defendant.

Now comes the United States of America, by Aloysius I. McCormick, United States Attorney for the Southern District of California, and brings this action on behalf of the United States against the San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation organized and doing business under the laws of the State of Utah, and having an office and place of business at Kelso in the State of California; this action being brought upon suggestion of the Attorney General of the United States at the request

of the Interstate Commerce Commission, and upon information furnished by said Commission. [11]

FOR A FIRST CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a corporation and a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, during the twenty-four hour period beginning at the hour of 8:00 o'clock, A. M., on January 19, 1911, at its office and station at Kelso, in the State of California, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to wit, J. N. Grandee, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to wit, from said hour of 8:00 o'clock, A. M., on January 19, 1911, to the hour of 8:00 o'clock, P. M., on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.
[12]

FOR A SECOND CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein a corporation and a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, during the twenty-four hour period beginning at the hour of 8:00 o'clock P. M., on January 19, 1911, at its office and station at Kelso, in the State of California, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to wit, W. T. Dugan to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to wit, from said hour of 8:00 o'clock, P. M. on January 19, 1911, to the hour of 8:00 o'clock, A. M., on January 20, 1911.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affect-

ing the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[13]

FOR A THIRD CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a corporation and a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, during the twenty-four hour period beginning at the hour of 8:00 o'clock P. M., on January 20, 1911, at its office and station at Kelso, in the State of California, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to wit, W. T. Dugan, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to wit, from said hour of 8:00 o'clock P. M., on January 20, 1911, to the hour of 8:00 o'clock A. M., on January 21, 1911.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph

or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[14]

FOR A FOURTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a corporation and a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, during the twenty-four hour period beginning at the hour of 2:00 P. M., on January 18, 1911, at its office and station at Otis, in the State of California, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to wit, J. B. Foster, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to wit, from said hour of 2:00 o'clock P. M., on January 18, 1911, to the hour of 4:30 o'clock A. M., on January 19, 1911.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said em-

ployee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[15]

FOR A FIFTH CAUSE OF ACTION

plaintiff alleges that said defendant is and was during all the times mentioned herein a corporation and a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, during the twenty-four-hour period beginning at the hour of 1:20 o'clock A. M., on January 18, 1911, at its office and station at Otis, in the State of California, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to wit, O. H. Perry, to be and remain on duty for a longer period than nine hours in said twenty-four hour period, to wit, from said hour of 1:20 o'clock, A. M., on January 18, 1911, to the hour of 2:00 o'clock P. M. on said date.

Plaintiff further alleges that during all the times

mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars. [16]

WHEREFORE, plaintiff prays judgment against said defendant in the sum of two thousand five hundred dollars and its costs herein expended.

A. I. McCORMICK,
United States Attorney.

[Endorsed]: No. 106 Civil. In the District Court of the United States, for the Sou. Dist. of California. United States of America, Plaintiff, vs. San Pedro, Los Angeles & Salt Lake Railroad Company, Defendant. Complaint. Filed Sep. 15, 1911, at 2 min. past 12 o'clock P. M. E. H. Owen, Clerk.
———, Deputy. [17]

[Summons in Case No. 106.]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,

Defendant.

Action brought in the said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City of Los Angeles, County of Los Angeles.

The President of the United States of America,
Greeting: To San Pedro, Los Angeles & Salt Lake Railroad Company, a Corporation.

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the District Court of the United States, in and for the Southern District of California, and to file your plea, answer or demurrer, to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the Clerk of said Court, in the City of Los Angeles, County of Los Angeles, within twenty days after the service on you of this summons, or judgment by default will be taken against you.

The said action is brought to recover of defendant the sum of two Thousand Five Hundred (\$2500.00)

Dollars and costs expended, alleged to be due for violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page [18] 1415). Reference is hereby had to the complaint on file herein for particulars (a copy of which is hereunto attached), said complaint containing five causes of action, and praying for judgment of \$500.00 upon each and every of said cause of action, and if you fail to appear and plead, answer or demur, as herein required, your default will be entered and the plaintiff will apply to the Court for the relief demanded in the complaint.

WITNESS, the Honorable OLIN WELLBORN, Judge of the District Court of the United States, in and for the Southern District of California, this 15th day of September, in the year of our Lord one thousand nine hundred and eleven, and of our Independence the one hundred and thirty-sixth.

[Seal]

E. H. OWEN,
Clerk.

By C. E. Scott,
Deputy Clerk.

United States Marshal's Office,
Southern District of California.

I HEREBY CERTIFY, that I received the within writ on the 20th day of September, 1911, and personally served the same on the 21st day of September, 1911, by delivering to and leaving with Mr. R. E. Wells, Gen. Mgr. San Pedro, Los Angeles & Salt

Lake R. R. Co., said defendant named therein, personally, at the County of Los Angeles, in said District, a certified copy thereof, together with a copy of the Complaint, certified to by E. H. Owen, attached thereto.

Los Angeles, Sept. 21, 1911.

LEO V. YOUNGWORTH,

U. S. Marshal.

By E. Dingle,

Deputy. [19]

[Endorsed]: Marshal's Civil Docket No. 1778. No. 106 Civil. U. S. District Court, Southern District of California, Southern Division. United States of America vs. San Pedro, Los Angeles & Salt Lake Railroad Co. Original Summons. A. I. McCormick, Plaintiff's Attorney. Filed Sep. 22, 1911, at 10 min. past 10 o'clock A. M. E. H. Owen, Clerk. C. E. Scott, Deputy. [20]

*In the District Court of the United States, for the
Southern District of California, Southern
Division.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,

Defendant.

Answer [in Case No. 106].

Comes now the defendant in the above-entitled ac-

tion, and for answer to the complaint filed herein, avers:

FIRST CAUSE OF ACTION.

For answer to the first cause of action, defendant avers that an emergency existed which made it necessary for this defendant to require the said J. N. Grande mentioned in said first cause of action to be and remain on duty during all of the times and at the place mentioned in said first cause of action, in order to preserve the lives of passengers upon the trains of this defendant, and to avoid collisions and the destruction of life and property; and defendant avers that the employment of said J. N. Grandee during the hours aforesaid was unavoidable and such as is permitted by section 2 of the Act referred to in said complaint.

SECOND CAUSE OF ACTION.

For answer to the second cause of action, defendant avers that an emergency existed which made it necessary for this defendant to require the said W. T. Dugan mentioned in said second cause of action to be and remain on duty during all of the times and at the place mentioned in said second cause of action, in order to preserve the lives of passengers upon the trains of this defendant, and to avoid collisions and the destruction of life and property; and defendant avers that the employment of said W. T. Dugan during the hours aforesaid was unavoidable and such as is permitted by section [21] 2 of the Act referred to in said complaint.

THIRD CAUSE OF ACTION.

For answer to the third cause of action, defendant

avers that an emergency existed which made it necessary for this defendant to require the said W. T. Dugan mentioned in said third cause of action to be and remain on duty during all of the times and at the place mentioned in said third cause of action, in order to preserve the lives of passengers upon the trains of this defendant, and to avoid collisions and the destruction of life and property; and defendant avers that the employment of said W. T. Dugan during the hours aforesaid was unavoidable and such as is permitted by section 2 of the Act referred to in said complaint.

FOURTH CAUSE OF ACTION.

For answer to the fourth cause of action, defendant avers that an emergency existed which made it necessary for this defendant to require the said J. B. Foster mentioned in said fourth cause of action to be and remain on duty during all of the times and at the place mentioned in said fourth cause of action, in order to preserve the lives of passengers upon the trains of this defendant and to avoid collisions and the destruction of life and property; and defendant avers that the employment of said J. B. Foster during the hours aforesaid was unavoidable and such as is permitted by section 2 of the Act referred to in said complaint.

FIFTH CAUSE OF ACTION.

For answer to the fifth cause of action, defendant avers that an emergency existed which made it necessary for this defendant to require the said O. H. Perry mentioned in said fifth cause of action to be and remain on duty during all of the times and at the

place mentioned in said fifth cause of action in order to preserve the lives of passengers upon the trains of this defendant and to avoid collisions and the destruction of life and property; and defendant avers that the employment of said O. H. Perry during the hours aforesaid was unavoidable and such as is permitted by section [22] 2 of the Act referred to in said complaint.

WHEREFORE, defendant says that it has not in aught violated or transgressed any of the provisions of the Act aforesaid, and it asks to be discharged herefrom without cost, and for all other relief proper in the premises.

A. S. HALSTED,
W. F. PALMER,
Attorneys for Defendant.

State of California,
County of Los Angeles,—ss.

W. H. Comstock, being first duly sworn, deposes and says: That he is the Secretary of San Pedro, Los Angeles & Salt Lake Railroad Company, the defendant in the above-entitled action; that he has heard read the foregoing Answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information and belief, and as to those matters he believes it to be true.

W. H. COMSTOCK.

Subscribed and sworn to before me, this 4th day of October, 1911. .

[Seal]

AMELIA GUEST,
Notary Public.

[Endorsed]: No. 106 Civil. U. S. District Court, Southern District of California. United States of America, Plaintiff, vs. San Pedro, Los Angeles, & Salt Lake Railroad Co., Defendant. Answer. Filed October 4, 1911 E. H. Owen, Clerk. By C. E. Scott, Deputy Clerk. Received copy of the within answer this 4 day of Oct., 1911. A. I. McCormick, U. S. Atty. By G. E. C., Asst. Solicitor for Plaintiff, 502-4 Pacific Electric Bldg., Los Angeles, Cal. A. S. Halsted & W. F. Palmer, Solicitors for Defendant. [23]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,

Defendant.

Demurrer to Answer [in Case No. 106].

Comes now the plaintiff, United States of America, and demurs to the answer of the defendant in the above-entitled action on the following grounds, to wit:

I.

DEMURRER TO ANSWER TO FIRST CAUSE
OF ACTION.

Plaintiff demurs to defendant's answer to the

first cause of action on the following grounds:

A. That said answer to said first cause of action does not, nor does any part thereof, state facts sufficient to constitute a defense to plaintiff's said first cause of action.

B. That said answer is *uncertain* in this, that it cannot be ascertained therefrom what the facts are from which defendant draws its conclusion "that an emergency existed which made it necessary for this defendant to require the said J. N. Grandee * * * to be and remain on duty" at the times charged in plaintiff's complaint; or what the facts are from which the defendant concludes that the detention of the said employee in service, as alleged, was "unavoidable" and such as is permitted by the Act.
[24]

C. That said answer to said first cause of action is *unintelligible* for the same reasons for which it is herein alleged to be uncertain.

II.

DEMURRER TO ANSWER TO SECOND CAUSE OF ACTION.

Plaintiff demurs to defendant's answer to the second cause of action on the following grounds:

A. That said answer to said second cause of action does not, nor does any part thereof, state facts sufficient to constitute a defense to plaintiff's said second cause of action.

B. That said answer is uncertain in this, that it cannot be ascertained therefrom what the facts are from which defendant draws its conclusion "that an emergency existed which made it necessary for this

defendant to require the said W. T. Dugan * * * to be and remain on duty” at the times charged in plaintiff’s complaint; or what the facts are from which the defendant concludes that the detention of the said employee in service, as alleged, was “unavoidable” and such as is permitted by the Act.

C. That said answer to said second cause of action is *unintelligible* for the same reasons for which it is herein alleged to be uncertain.

III.

DEMURRER TO ANSWER TO THIRD CAUSE OF ACTION.

Plaintiff demurs to defendant’s answer to the third cause of action on the following grounds:

A. That said answer to said third cause of action does not, nor does any part thereof, state facts sufficient to constitute a defense to plaintiff’s said third cause of action. [25]

B. That said answer is uncertain in this, that it cannot be ascertained therefrom what the facts are from which defendant draws its conclusion “that an emergency existed which made it necessary for this defendant to require the said W. T. Dugan * * * to be and remain on duty” at the times charged in plaintiff’s complaint; or what the facts are from which the defendant concludes that the detention of the said employee in service, as alleged, was “unavoidable” and such as is permitted by the Act.

C. That said answer to said third cause of action is *unintelligible* for the same reasons for which it is herein alleged to be uncertain.

IV.

DEMURRER TO ANSWER TO FOURTH
CAUSE OF ACTION.

Plaintiff demurs to defendant's answer to the fourth cause of action on the following grounds:

A. That said answer to said fourth cause of action does not, nor does any part thereof, state facts sufficient to constitute a defense to plaintiff's said fourth cause of action.

B. That said answer is uncertain in this, that it cannot be ascertained therefrom what the facts are from which defendant draws its conclusion "that an emergency existed which made it necessary for this defendant to require the said J. B. Foster * * * to be and remain on duty" at the times charged in plaintiff's complaint; or what the facts are from which the defendant concludes that the detention of the said employees in service, as alleged, was "unavoidable" and such as is permitted by the Act. [26]

C. That said answer to said fourth cause of action is *unintelligible* for the same reasons for which it is herein alleged to be uncertain.

V.

DEMURRER TO ANSWER TO FIFTH CAUSE
OF ACTION.

Plaintiff demurs to defendant's answer to the fifth cause of action on the following grounds:

A. That said answer to said fifth cause of action does not, nor does any part thereof, state facts sufficient to constitute a defense to plaintiff's said fifth cause of action.

B. That said answer is uncertain in this, that it cannot be ascertained therefrom what the facts are from which defendant draws its conclusion "that an emergency existed which made it necessary for this defendant to require the said O. H. Perry * * * to be and remain on duty" at the times charged in plaintiff's complaint; or what the facts are from which the defendant concludes that the detention of the said employee in service, as alleged, was "unavoidable" and such as is permitted by the Act.

C. That said answer to said fifth cause of action is *unintelligible* for the same reasons for which it is herein alleged to be uncertain.

WHEREFORE plaintiff prays that its demurrer to said answer to said several counts be sustained and that plaintiff have judgment against defendant as prayed.

A. I. McCORMICK,
United States Attorney,
GEO. E. CRYER,
Asst. United States Attorney,
Attorneys for Plaintiff.

[Endorsed]: No. 106 Civil. In the District Court of the United [27] States for the Sou. Dist. of California, Southern Division. United States of America, Plaintiff, vs. San Pedro, Los Angeles and Salt Lake Railroad Company, Defendant. Demurrer to Answer. Filed Oct. 11, 1911. E. H. Owen, Clerk. By C. E. Scott, Deputy. Copy received Oct. 11, 1911. A. S. Halsted, W. F. Palmer, Attys. for Defendant. [28]

**[Order in Case No. 106 Sustaining Demurrer to
Answer, etc.]**

At a stated term, to wit, the July Term, A. D. 1912,
of the District Court of the United States of
America in and for the Southern District of Cal-
ifornia, Southern Division, held at the court-
room thereof, in the city of Los Angeles, on Mon-
day, the eighth day of July, in the year of our
Lord one thousand nine hundred and twelve.
Present: The Honorable OLIN WELLBORN,
District Judge.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILWAY COMPANY,
Defendant.

This cause coming on at this time to be further
heard on plaintiff's demurrer to defendant's answer:
Dudley W. Robinson, Esq., Assistant U. S. Attorney,
appearing as counsel for the United States; W. F.
Palmer, Esq., appearing as counsel for defendant;
and said cause having been further argued, on be-
half of the United States, by Dudley W. Robinson,
Esq., of counsel for the United States; and having
also been further argued on behalf of the defendant
by W. F. Palmer, Esq., of counsel for defendant,
and having been further argued on behalf of the
United States in reply by Dudley W. Robinson, Esq.,
Assistant U. S. Attorney, of counsel for the United
States; and said cause having been submitted to the

Court for its consideration and decision; it is now by the Court ordered that said demurrer of plaintiffs to the answer of the defendant be, and the same hereby is sustained, with leave to said defendant to amend its answer within thirty (30) days, if it shall be so advised; whereupon defendant requests leave to carry the demurrer to defendant's answer back and sustain the same to the complaint herein, which request is by [29] the Court denied; and it is ordered that defendant be and he hereby is granted ten (10) days within which to prepare and serve a bill of exceptions.

[Endorsed]: No. 106 Civil. United States District Court, Southern District of California, Southern Division. The United States of America, Plaintiffs, vs. San Pedro, Los Angeles & Salt Lake Railroad Company, Defendant. Copy of Minute Order. Filed October 10, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [30]

ORIGINAL.

*In the District Court of the United States, for the
Southern District of California, Southern
Division.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,

Defendant.

Amended Answer [in Case No. 106].

Comes now the defendant in the above-entitled action, and for its Amended Answer to the complaint filed herein says:

FIRST CAUSE OF ACTION.

For amended answer to the first cause of action this defendant avers that at the time alleged in said paragraph of the complaint, the force of telegraphers employed at Kelso consisted of an Agent operator, whose hours were from 8 o'clock A. M. to 4 o'clock P. M., and two telegraph operators, whose hours were from 4 o'clock P. M. to 12 o'clock midnight, and from 12 o'clock midnight to 8 o'clock A. M. respectively; that on January 16th, 1911, one W. F. Starkey was one of the telegraph operators so employed by defendant at said station, and his regular hours were from 4 o'clock P. M. to 12 o'clock midnight; that on said 16th day of January, 1911, the said Starkey was taken suddenly ill and incapacitating him from service as a telegraph operator; that said Kelso station is a helper terminal and an important telegraph station, and an office which it is necessary to keep in operation continuously during the entire 24 hours of each day; that at the time said Starkey was taken ill there was no available telegraph operator at Kelso to replace him, and it was necessary for this defendant to procure another operator and send him to said station, and that as soon as possible this defendant did procure an operator, V. G. Ham, and send him to Kelso for service to

take the place of said Starkey, and the said Ham began his term of service as soon as possible, to wit, January 20th, 1911. [31]

Wherefore, this defendant says that by reason of the aforesaid facts, an emergency arose and existed which required and made it necessary and imperative for this defendant to require the said J. N. Grandee to work overtime as alleged in the complaint.

SECOND CAUSE OF ACTION.

And for its amended answer to the second cause of action mentioned in said complaint, this defendant re-avers each and every allegation contained in its answer to the first cause of action, and further says that by reason of said facts an emergency arose and existed which required and made it necessary and imperative for this defendant to require the said W. T. Dugan to work overtime as alleged in the complaint.

THIRD CAUSE OF ACTION.

And for its amended answer to the third cause of action mentioned in said complaint, this defendant re-avers each and every allegation contained in its answer to the first cause of action, and further says that by reason of said facts an emergency arose and existed which required and made it necessary and imperative for this defendant to require the said W. T. Dugan to work overtime as alleged in the complaint.

FOURTH CAUSE OF ACTION.

And for its amended answer to the fourth cause of action mentioned in said complaint, this defend-

ant avers that Otis is a freight division terminal upon its said line of railroad, and it is necessary to and this defendant does, keep in its employ three telegraph operators, whose regularly assigned hours are from 6 o'clock A. M. to 2 o'clock P. M.; from 2 o'clock P. M. to 10 o'clock P. M., and from 10 o'clock P. M. to 6 o'clock A. M. respectively; that on January 18th, 1911, the defendant had employed as its [32] telegraphing force at said Otis station, W. Casey, O. H. Perry and J. B. Foster; that on said January 18th, 1911, the said Casey, whose hours were from 10 o'clock P. M. to 6 o'clock A. M., appeared at defendant's telegraph office for duty in a state of helpless intoxication and could not safely handle train orders or transact any other business over the wires, and this defendant performed its duty by refusing to permit said Casey to go to work, and immediately proceeded to find a successor to said Casey; that no extra operator could be found at Otis to take the place of said Casey, and the said O. H. Perry and said J. B. Foster were required and did work overtime to supply the place of said Casey; that as soon as possible thereafter, to wit, January 19th, 1911, this defendant procured the services of one W. H. Williams and caused him to report at said telegraph office at Otis and take the place of said Casey, and that the said Williams did take the place of said Casey at as early a date as practicable.

Wherefore, this defendant says that by reason of the aforesaid facts, an emergency arose and existed which required and made it necessary and imperative for this defendant to require the said O. H.

Perry and said J. B. Foster to work overtime as alleged in said complaint.

FIFTH CAUSE OF ACTION.

And for its amended answer to the fifth cause of action mentioned in said complaint, this defendant re-avers all of the allegations contained in its amended answer to the fourth cause of action above, and further says that by reason of the facts aforesaid, an emergency arose and existed which required and made it necessary and imperative for this defendant to require the said O. H. Perry and said J. B. Foster to work overtime as alleged in said complaint.

WHEREFORE, this defendant says that it has not in aught [33] violated or transgressed any of the provisions of the Act mentioned in the complaint, and asks to be discharged herefrom without cost, and for all other relief proper in the premises.

A. S. HALSTED,

W. F. PALMER,

Attorneys for Defendant.

State of California,

County of Los Angeles,—ss.

W. H. Comstock, being first duly sworn, deposes and says, that he is the Secretary of San Pedro, Los Angeles & Salt Lake Railroad Company, defendant in the above-entitled action; that he has heard read the foregoing Amended Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as

to those matters he believes it to be true.

W. H. COMSTOCK.

Subscribed and sworn to before me, this 7th day of August, 1912.

[Seal]

FRANCIS J. MIEDING,

Notary Public.

[Endorsed]: No. 106 Civil. U. S. District Court, Ninth Circuit, Southern District of California. The United States of America, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., Defendant. Amended Answer. Filed Aug. 7, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of the within answer this 7 day of Aug., 1912. A. I. McCormick. By Regan. Solicitor for ———. A. S. Halsted, W. F. Palmer, 502-4 Pacific Electric Bldg., Los Angeles, Cal., Solicitors for Defendant.
[34]

[Complaint in Case No. 243.]

In the District Court of the United States, for the Southern District of California, ——— Division.

1838.

No. —.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,

Defendant.

Now comes the United States of America, by Aloysius I. McCormick, United States Attorney for the Southern District of California, and brings this action on behalf of the United States against the San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation organized and doing business under the laws of the State of Utah, and having an office and place of business at Los Angeles, in the State of California; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission. [35]

FOR A FIRST CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 12:30 o'clock P. M. on October 1, 1912, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Crestmore, in said State, within the jurisdiction of this Court, required and permitted its certain engineer and employee, to wit, C. A. Cochrane, to be and remain on duty as such for a longer period than sixteen con-

secutive hours, to wit, from said hour of 12:30 o'clock P. M., on said date, to the hour of 10:40 o'clock A. M., on October 2, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra east and west drawn by its own locomotive engine No. 3639, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.
[36]

FOR A SECOND CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 12:30 o'clock P. M. on October 1, 1912, upon its line of railroad at and between the stations of Los Angeles, in the State of California, and Crestmore, in said State, within the jurisdiction of this Court, required and permitted its certain fireman and employee, to wit, A. B. Kleir, to be and remain on duty as such for a longer period than sixteen consecutive

hours, to wit, from said hour of 12:30 o'clock P. M. on said date to the hour of 10:40 o'clock A. M. on October 2, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra east and west drawn by its own locomotive engine No. 3639, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[37]

FOR A THIRD CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:00 o'clock P. M. on October 3, 1912, upon its line of railroad at and between the stations of Las Vegas, in the State of Nevada, and Los Angeles, in the State of California, within the jurisdiction of this Court required and permitted its certain conductor and employee, to wit, G. D. Brown, to be and remain on duty as such for a longer period than six-

teen consecutive hours, to wit, from said hour of 5:00 o'clock P. M., on said date, to the hour of 8:00 o'clock P. M. on October 4, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train number 1 drawn by its own locomotive engine No. 3434, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress said defendant is liable to plaintiff in the sum of five hundred dollars. [38]

FOR A FOURTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:00 o'clock P. M. on October 3, 1912, upon its line of railroad at and between the stations of Las Vegas in the State of Nevada, and Los Angeles, in the State of California, within the jurisdiction of this court, required and permitted its certain brakeman and employee, to wit, R. A. Edwards, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00

o'clock P. M., on said date, to the hour of 8:00 o'clock P. M., on October 4, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train number 1 drawn by its own locomotive engine No. 3434, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress said defendant is liable to plaintiff in the sum of five hundred dollars. [39]

FOR A FIFTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:00 o'clock P. M. on October 3, 1912, upon its line of railroad at and between the stations of Las Vegas, in the State of Nevada, and Los Angeles, in the State of California, within the jurisdiction of this court, required and permitted its certain brakeman and employee, to wit, H. F. Berringer, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00 o'clock P. M. on said date, to the hour of 8:00

o'clock P. M. on October 4, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train number 1 drawn by its own locomotive engine No. 3434, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.
[40]

FOR A SIXTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:30 o'clock A. M., on October 4, 1912, upon its line of railroad at and between the stations of Las Vegas, in the State of Nevada, and Los Angeles, in the State of California, within the jurisdiction of this court, required and permitted its certain conductor and employee, to wit, J. P. Fitzpatrick, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:30 o'clock A. M. on said date to the hour of

6:25 o'clock A. M. on October 5, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train number 7 drawn by its own locomotive engine No. 3433, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[41]

FOR A SEVENTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:30 o'clock A. M. on October 4, 1912, upon its line of railroad at and between the stations of Las Vegas, in the State of Nevada, and Los Angeles, in the State of California, within the jurisdiction of this court, required and permitted its certain brakeman and employee, to wit, J. S. Roberts, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:30 o'clock A. M. on said date, to the hour of 6:25 o'clock

A. M. on October 5, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train number 7 drawn by its own locomotive engine No. 3433, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.
[42]

FOR AN EIGHTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:30 o'clock A. M. on October 4, 1912, upon its line of railroad at and between the stations of Las Vegas, in the State of Nevada, and Los Angeles, in the State of California, within the jurisdiction of this court, required and permitted its certain brakeman and employee, to wit, C. A. Carter, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:30 o'clock A. M. on said date to the hour of 6:25 o'clock

A. M. on October 5, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train number 7 drawn by its own locomotive engine No. 3433, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.
[43]

FOR A NINTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 2:30 o'clock P. M. on October 7, 1912, upon its line of railroad at and between the stations of San Bernardino, in the State of California, and Pomona, in said State, within the jurisdiction of this court, required and permitted its certain engineer and employee, to wit, Charles W. Madden, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 2:30 o'clock

P. M. on said date to the hour of 2:40 o'clock P. M. on October 8, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west drawn by its locomotive engine No. 3617, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[44]

FOR A TENTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 2:30 o'clock P. M. on October 7, 1912, upon its line of railroad at and between the stations of San Bernardino, in the State of California, and Pomona, in said State, within the jurisdiction of this court, required and permitted its certain fireman and employee, to wit, Joe Glynn, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 2:30 o'clock P. M.

on said date to the hour of 2:40 o'clock P. M. on October 8, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west drawn by its locomotive engine No. 3617, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.
[45]

FOR AN ELEVENTH CAUSE OF ACTION
plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:00 o'clock P. M. on October 8, 1912, upon its line of railroad at and between the stations of Las Vegas, in the State of Nevada, and Scott, in the State of California, within the jurisdiction of this court, required and permitted its certain engineer and employee, to wit, H. P. Mitchell to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00 o'clock

P. M. on said date to the hour of 10:30 o'clock A. M. on October 9, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west drawn by its own locomotive engine No. 3669, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[46]

FOR A TWELFTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:00 o'clock P. M. on October 8, 1912, upon its line of railroad at and between the stations of Las Vegas, in the State of Nevada, and Scott, in the State of California, within the jurisdiction of this Court, required and permitted its certain fireman and employee, to wit, C. S. Caskey, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00

o'clock P. M. on said date to the hour of 10:30 o'clock A. M. on October 9, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west drawn by its own locomotive engine No. 3669, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.
[47]

FOR A THIRTEENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 8:45 o'clock P. M. on October 13, 1912, upon its line of railroad at and between the stations of Otis, in the State of California, and San Bernardino, in said State, within the jurisdiction of this Court, required and permitted its certain engineer and employee, to wit, O. A. Weeks, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 8:45

o'clock P. M. on said date to the hour of 3:55 o'clock P. M. on October 14, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train 81 and extra west drawn by its own locomotive engine No. 3666, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.
[48]

FOR A FOURTEENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 8:45 P. M. on October 13, 1912, upon its line of railroad at and between the stations of Otis, in the State of California, and San Bernardino, in said State, within the jurisdiction of this Court, required and permitted its certain fireman and employee, to wit, Jess All, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 8:45 o'clock P. M.

on said date to the hour of 3:55 o'clock P. M. on October 14, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train 81 and extra west drawn by its own locomotive engine No. 3666, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[49]

FOR A FIFTEENTH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 4:15 o'clock P. M. on October 16, 1912, upon its line of railroad at and between the stations of San Bernardino, in the State of California, and Los Angeles, in said State, within the jurisdiction of this Court, required and permitted its certain engineer and employee, to wit, J. G. Allison, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of

4:15 o'clock P. M. on said date to the hour of 9:45 o'clock A. M. on October 17, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west drawn by its own locomotive engine No. 3629, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[50]

FOR A SIXTEENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 4:15 o'clock P. M. on October 16, 1912, upon its line of railroad at and between the stations of San Bernardino, in the State of California, and Los Angeles, in said State, within the jurisdiction of this Court, required and permitted its certain fireman and employee, to wit, F. Thompson, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 4:15

o'clock P. M. on said date to the hour of 9:45 o'clock A. M. on October 17, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west, drawn by its own locomotive engine No. 3629, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[51]

FOR A SEVENTEENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at at the hour of 6:15 o'clock P. M on October 18, 1912, upon its line of railroad at and between the stations of Las Vegas, in the State of Nevada, and Otis, in the State of California, within the jurisdiction of this Court, required and permitted its certain engineer and employee, to wit, Joel V. Noblitt, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of

6:15 o'clock P. M. on said date to the hour of 11:40 o'clock A. M. on October 19, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west drawn by its own locomotive engine No. 3666, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.
[52]

FOR AN EIGHTEENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 6:15 o'clock P. M. on October 18, 1912, upon its line of railroad at and between the stations of Las Vegas, in the State of Nevada, and Otis, in the State of California, within the jurisdiction of this Court, required and permitted its certain fireman and employee, to wit, H. O. Johnson, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 6:15 o'clock

P. M. on said date to the hour of 11:40 o'clock A. M. on October 19, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west drawn by its own locomotive engine No. 3666, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[53]

FOR A NINETEENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:00 o'clock A. M. on October 27, 1912, upon its line of railroad at and between the stations of Las Vegas, in the State of Nevada, and Otis, in the State of California, within the jurisdiction of this Court, required and permitted its certain engineer and employee, to wit, J. C. Frazier, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00 o'clock

A. M. on said date to the hour of 11:00 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west drawn by its own locomotive engine No. 3668, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[54]

FOR A TWENTIETH CAUSE OF ACTION

plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 5:00 o'clock A. M. on October 27, 1912, upon its line of railroad at and between the stations of Las Vegas, in the State of Nevada, and Otis, in the State of California, within the jurisdiction of this Court, required and permitted its certain fireman and employee, to wit, L. Cruncleston, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 5:00

o'clock A. M. on said date to the hour of 11:00 o'clock P. M. on said date.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west drawn by its own locomotive engine No. 3668, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[55]

FOR A TWENTY-FIRST CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour of 3:40 o'clock P. M. on October 31, 1912, upon its line of railroad at and between the stations of San Bernardino, in the State of California, and Ontario, in said State, within the jurisdiction of this Court, required and permitted its certain engineer and employee, to wit, Charles W. Madden, to be and remain on duty as such for a longer period than sixteen consecutive hours, to wit, from said hour of 3:40

o'clock P. M. on said date to the hour of 10:00 o'clock A. M. on November 1, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west drawn by its own locomotive engine No. 3627, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.

[56]

FOR A TWENTY-SECOND CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), said defendant, beginning at the hour 3:40 o'clock P. M. on October 31, 1912, upon its line of railroad at and between the stations of San Bernardino, in the State of California, and Ontario, in said State, within the jurisdiction of this court, required and permitted its certain fireman and employee, to wit, Joe Glynn, to be and remain on duty as such for a longer period than sixteen con-

secutive hours, to wit, from said hour of 3:40 o'clock P. M. on said date to the hour of 10:00 o'clock A. M. on November 1, 1912.

Plaintiff further alleges that said employee, while required and permitted to be and remain on duty as aforesaid, was engaged in and connected with the movement of said defendant's train extra west drawn by its locomotive engine No. 3627, said train being then and there engaged in the movement of interstate traffic.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of five hundred dollars.
[57]

WHEREFORE, plaintiff prays judgment against said defendant in the sum of eleven thousand dollars and its costs herein expended.

A. I. McCORMICK,

United States Attorney.

HARRY R. ARCHBALD,

Asst. U. S. Attorney.

[Endorsed]: No. 243 Civil. In the District Court of the United States, for the Sou. Dist. of California, Southern Division. United States of America, Plaintiff, vs. San Pedro, Los Angeles & Salt Lake Railroad Company, Defendant. Complaint. Filed Mar. 7, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [58]

*In the District Court of the United States for the
Southern District of California, Southern Di-
vision.*

No. 243—Civil.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY, a Corporation,
Defendant.

Answer [in Case No. 243].

Comes now the defendant, and for its answer to
the complaint of the plaintiff on file herein, says:

I.

That answering the first cause of action therein,
it denies that beginning at the hour of 12:30 o'clock
P. M., on October 1st, 1912, upon its line of railroad,
at or between the stations of Los Angeles, California,
and Crestmore, California, and within the jurisdic-
tion of this court, or at any other place, it required or
permitted its engineer, C. A. Cochrane, to be or re-
main on duty as such, or at all, for a longer period
than 16 consecutive hours.

Denies that the said Cochrane was so on duty from
said hour of 12:30 o'clock P. M., on October 1st, 1912,
until the hour of 10:40 o'clock A. M., on October 2d,
1912, or longer than until the hour of 4:30 o'clock
A. M., of said October 2d, 1912.

Denies that said engineer, C. A. Cochrane, was re-
quired or permitted to be or remain on duty as set

out in said first cause of action, or was engaged in or connected with the movement of defendant's train extra east and west, or any other train, drawn by its own locomotive engine No. 3639, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said first cause of action, the defendant is liable to the plaintiff in the sum of \$500.00, or any other sum.
[59]

II.

That answering the second cause of action therein, it denies that beginning at the hour of 12:30 P. M., on October 1st, 1912, upon its line of railroad, at or between the stations of Los Angeles, California, and Crestmore, California, and within the jurisdiction of this court, or at any other place, it required or permitted its fireman, A. B. Kleir, to be or remain on duty as such, or at all, for a longer period than 16 consecutive hours;

Denies that said Kleir was so on duty from said hour of 12:30 o'clock P. M., on October 1st, 1912, until the hour of 10:40 o'clock A. M., on October 2d, 1912, or longer than until the hour of 4:30 o'clock A. M., of said October 2d, 1912.

Denies that said fireman, A. B. Kleir, was required or permitted to be or remain on duty as set out in said second cause of action, or was engaged in or connected with the movement of defendants train extra east and west, or any other train, drawn by its own locomotive engine No. 3639, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said second cause of action, the defendant is liable to the plaintiff in the sum of \$500.00, or any other sum.

III.

That answering the third cause of action therein, it denies that beginning at the hour of 5:00 P. M., on October 3d, 1912, upon its line of railroad, at or between the stations of Las Vegas, Nevada, and Los Angeles, California, and within the jurisdiction of this court, or at any other place, it required or permitted its conductor, G. D. Brown, to be or remain on duty as such, or at all, for a longer period than 16 consecutive hours.

Denies that said conductor, G. D. Brown, was required or permitted to be or remain on duty as set out in said third cause of action, or was engaged in or connected with the movement of defendant's [60] train No. 1, or any other train, drawn by its own locomotive engine No. 3434, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said third cause of action, the defendant is liable to the plaintiff in the sum of \$500.00, or any other sum.

IV.

That answering the fourth cause of action therein, it denies that beginning at the hour of 5:00 o'clock P. M., on October 3d, 1912, upon its line of railroad, at or between the stations of Las Vegas, Nevada, and Los Angeles, California, and within the jurisdiction of this court, or at any other place, it required or permitted its brakeman, R. A. Edwards, to be or remain on duty as such, or at all, for a longer period than 16 consecutive hours.

Denies that said brakeman, R. A. Edwards, was required or permitted to be or remain on duty as set out in said fourth cause of action, or was engaged in or connected with the movement of defendant's train No. 1, or any other train, drawn by its own locomotive engine No. 3434, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said fourth cause of action, the defendant is liable to the plaintiff in the sum of \$500.00, or any other sum.

V.

That answering the fifth cause of action therein, it denies that beginning at the hour of 5:00 o'clock P. M., on October 3d, 1912, upon its line of railroad, at or between the stations of Las Vegas, Nevada, and Los Angeles, California, and within the jurisdiction of this court, or at any other place, it required or permitted its brakeman, H. E. Berringer, to be or remain on duty as such, or at all, for a longer period than 16 consecutive hours.

Denies that said brakeman, H. E. Berringer, was required or [61] permitted to be or remain on duty as set out in said fifth cause of action, or was engaged in or connected with the movement of defendant's train No. 1, or any other train, drawn by its own locomotive engine No. 3434, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said fifth cause of action, the defendant is liable to the plaintiff in the sum of \$500.00, or any other sum.

VI.

That answering the sixth cause of action therein, it denies that beginning at the hour of 5:30 o'clock A. M., on October 4th, 1912, upon its line of railroad, at or between the stations of Las Vegas, Nevada, and Los Angeles, California, and within the jurisdiction of this court, or at any other place, it required or permitted its conductor, J. P. Fitzpatrick, to be or remain on duty as such, or at all, for a longer period than 16 consecutive hours.

Denies that said conductor, J. P. Fitzpatrick, was required or permitted to be or remain on duty as set out in said sixth cause of action, or was engaged in or connected with the movement of defendant's train No. 7, or any other train, drawn by its own locomotive engine No. 3433, the said train being then and there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said sixth cause of action, the defendant is liable to the plaintiff in the sum of \$500.00, or any other sum.

VII.

That answering the 7th cause of action herein, it denies that beginning with the hour of 5:30 o'clock A. M., on October 4th, 1912, upon its line of railroad, at or between the stations of Las Vegas, Nevada, and Los Angeles, California, and within the jurisdiction of this court, or at any other place, it required or permitted its brakeman, J. S. Roberts, to be or remain on duty, as such [62] or at all, for a longer period than 16 consecutive hours.

Denies that said brakeman, J. S. Roberts, was required or permitted to be or remain on duty as set

out in said 7th cause of action, or was engaged in or connected with the movement of defendant's train No. 7, or any other train, drawn by its own locomotive engine No. 3433, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said 7th cause of action, the defendant is liable to the plaintiff in the sum of \$500.00, or any other sum.

VIII.

That answering the 8th cause of action therein, it denies that beginning at the hour of 5:50 o'clock A. M., on October 4th, 1912, upon its line of railroad, at or between the stations of Las Vegas, Nevada, and Los Angeles, California, and within the jurisdiction of this court, or at any other place, it required or permitted its brakeman, C. A. Carter, to be or remain on duty, as such, or at all, for a longer period than 16 consecutive hours.

Denies that said brakeman, C. A. Carter, was required or permitted to remain or be on duty as set out in said 8th cause of action, or was engaged in or connected with the movement of defendant's train No. 7, or any other train, drawn by its own locomotive engine No. 3433, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said 8th cause of action, the defendant is liable to the plaintiff in the sum of \$500.00, or any other sum.

IX.

That answering the 9th cause of action therein, it denies that beginning at the hour of 2:30 P. M., on October 7th, 1912, upon its line of railroad, at or be-

tween the stations of San Bernardino, California, and Pomona, California, and within the jurisdiction [63] of this court, or at any other place, it required or permitted its engineer, Charles W. Madden, to be or remain on duty, as such, or at all, for a longer period than 16 consecutive hours.

Denies that said Madden was so on duty from said hour of 2:30 o'clock P. M., on October 7th, 1912, until the hour of 2:40 o'clock P. M., on October 8th, 1912, or longer than until the hour of 6:15 o'clock A. M., on said October 8th, 1912.

Denies that said engineer, Charles W. Madden, was required or permitted to be or remain on duty as set out in said 9th cause of action, or was engaged in or connected with the movement of defendant's train extra west, or any other train, drawn by its own locomotive engine No. 3617, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said 9th cause of action, the defendant is liable to the plaintiff in the sum of \$500.00, or any other sum.

X.

That answering the tenth cause of action therein, it denies that beginning at the hour of 2:30 o'clock P. M., on October 7th, 1912, upon its line of railroad, at or between the stations of San Bernardino, California, and Pomona, California, and within the jurisdiction of this court, or at any other place, it required or permitted its fireman, Joe Glynn, to be or remain on duty, as such or at all, for a period longer than 16 consecutive hours.

Denies that said Glynn was so on duty from said hour of 2:30 o'clock P. M., on October 7th, 1912, until the hour of 2:40 o'clock P. M., on October 8th, 1912, or longer than until the hour of 6:15 A. M., on said October 8th, 1912.

Denies that said fireman, Joe Glynn, was required or permitted to be or remain on duty as set out in said tenth cause of action, or was engaged in or connected with the movement of defendant's train, extra west, or any other train, drawn by its own locomotive [64] engine No. 3617, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said tenth cause of action, the defendant is liable to the plaintiff in the sum of \$500.00, or any other sum.

XI.

That answering the 11th cause of action therein, it denies that beginning at the hour of 5:00 o'clock P. M. on October 8th, 1912, upon its line of railroad, at or between the stations of Las Vegas, Nevada, and Scott, California, and within the jurisdiction of this court, or at any other place, it required or permitted its engineer, H. P. Mitchell, to be or remain on duty, as such, or at all, for a longer period than 16 consecutive hours.

Denies that the said Mitchell was so on duty from said hour of 5:00 o'clock P. M. on October 8th, 1912, until the hour of 10:30 o'clock A. M. on October 9th, 1912, or longer than until the hour of 8:55 o'clock A. M. on said October 9th, 1912.

Denies that said engineer, H. P. Mitchell, was required or permitted to be or remain on duty as set

out in said 11th cause of action, or was engaged in or connected with the movement of defendant's train, extra west, or any other train, drawn by its own locomotive engine No. 3669, the said train being then and there engaged in the movement of the interstate traffic.

Denies that by reason of any facts alleged in said 11th cause of action, the defendant is liable to the plaintiff in the sum of \$500.00, or any other sum.

XII.

That answering the 12th cause of action therein, it denies that beginning at the hour of 5:00 o'clock P. M. on October 8th, 1912, upon its line of railroad, at or between the stations of Las Vegas, Nevada, and Scott, California, and within the jurisdiction of this court, or at any other place, it required or permitted its [65] fireman, C. E. Caskey, to be or remain on duty, as such, or at all, for a longer period than 16 consecutive hours.

Denies that said Caskey was so on duty from said hour of 5:00 o'clock P. M. on October 8th, 1912, until the hour of 10:30 o'clock A. M. on October 9th, 1912, or longer than until the hour of 8:55 o'clock A. M. on said October 9th, 1912.

Denies that said fireman, C. E. Caskey, was required or permitted to be or remain on duty as set out in said 12th cause of action, or was engaged in or connected with the movement of defendant's train, extra west, or any other train, drawn by its own locomotive engine No. 3669, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said

12th cause of action, the defendant is liable to the plaintiff in the sum of \$500.00, or any other sum.

XIII.

That answering the 13th cause of action therein, it denies that beginning at the hour of 8:45 o'clock P. M. on October 13th, 1912, upon its line of railroad, at or between the stations of Otis, California, and San Bernardino, California, and within the jurisdiction of this court, or at any other place, it required or permitted its engineer, O. A. Weeks, to be or remain on duty, as such, or at all, for a longer period than 16 consecutive hours.

Denies that said Weeks was so on duty from said hour of 8:45 o'clock P. M. on October 13th, 1912, until the hour of 3:55 o'clock P. M. on October 14th, 1912, or longer than until the hour of 12:35 o'clock P. M., on said October 14th, 1912.

Denies that said engineer, O. A. Weeks, was required or permitted to be or remain on duty as set out in said 13th cause of action, or was engaged in or connected with the movement of defendant's train 81 and extra west, or any other train, drawn by its own locomotive engine No. 3666, the said train being then or [66] there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said 13th cause of action, the defendant is liable to the plaintiff in the sum of \$500.00, or any other sum.

XIV.

That answering the 14th cause of action therein, it denies that beginning at the hour of 8:45 o'clock P. M. on October 13th, 1912, upon its line of railroad, at

or between the stations of Otis, California, and San Bernardino, California, and within the jurisdiction of this court, or at any other place, it required or permitted its fireman, Jesse All, to be or remain on duty, as such, or at all, for a longer period than 16 consecutive hours.

Denies that said All was so on duty from said hour of 8:45 o'clock P. M. on October 13th, 1912, until the hour of 3:55 o'clock P. M. on October 14th, 1912, or longer than until the hour of 12:35 o'clock P. M. on said October 14th, 1912.

Denies that said fireman, Jesse All, was required or permitted to be or remain on duty as set out in said 14th cause of action, or was engaged in or connected with the movement of defendant's train 81 and extra west, or any other train, drawn by its own locomotive engine No. 3666, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said 14th cause of action, the defendant is liable to the plaintiff in the sum of \$500.00, or any other sum.

XV.

That answering the 15th cause of action therein, it denies that beginning at the hour of 4:15 o'clock P. M. on October 16th, 1912, upon its line of railroad, at or between the stations of San Bernardino, California, and Los Angeles, California, and within the jurisdiction of this court, or at any other place, it required or permitted its engineer, J. G. Allison, to be or remain on duty, as [67] such, or at all, for a longer period than 16 consecutive hours.

Denies that said Allison was so on duty from said

hour of 4:15 o'clock P. M. on October 16th, 1912, until the hour of 9:45 o'clock A. M. on October 17th, 1912, or longer than until the hour of 8:15 o'clock A. M. on said October 17th, 1912.

Denies that said J. G. Allison was required or permitted to be or remain on duty as set out in said fifteenth cause of action, or was engaged in or connected with the movement of defendant's train extra west, or any other train, drawn by its own locomotive engine No. 3629, the said train being then and there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said 15th cause of action, the defendant is liable to the plaintiff in the sum of \$500.00 or any other sum.

XVI.

That answering the 16th cause of action therein, it denies that beginning at the hour of 4:15 o'clock P. M. on October 16th, 1912, upon its line of railroad, at or between the stations of San Bernardino, California, and Los Angeles, California, and within the jurisdiction of this court, or any other place, it required or permitted its fireman, F. Thompson, to be or remain on duty, as such, or at all, for a longer period than 16 consecutive hours.

Denies that said Thompson was so on duty from said hour of 4:15 o'clock P. M. on October 16th, 1912, until the hour of 9:45 o'clock A. M. on October 17th, 1912, or longer than until the hour of 8:15 o'clock A. M. on said October 17th, 1912.

Denies that said fireman, F. Thompson, was required or permitted to be or remain on duty as set out in said 16th cause of action, or was engaged in

or connected with the movement of defendant's train, extra west, or any other train, drawn by its own locomotive engine No. 3629, the said train being then or there engaged in the movement of interstate traffic. [68]

Denies that by reason of any facts alleged in said 16th cause of action, the defendant is liable to the plaintiff in the sum of \$50.00 or any other sum.

XVII.

That answering the 17th cause of action therein, it denies that beginning at the hour of 6:15 o'clock P. M. on October 18th, 1912, upon its line of railroad, at or between the stations of Las Vegas, Nevada, and Otis, California, and within the jurisdiction of this court, or at any other place, it required or permitted its engineer, Joel V. Noblitt, to be or remain on duty, as such, or at all, for a longer period than sixteen consecutive hours.

Denies that said Noblitt was so on duty from said hour of 6:15 o'clock P. M. on October 18th, 1912, until the hour of 11:40 o'clock A. M. on October 19th, 1912, or longer than until the hour of 10:10 o'clock A. M. on said October 19th, 1912.

Denies that said engineer, Joel V. Noblitt, was required or permitted to be or remain on duty as set out in said 17th cause of action, or was engaged in or connected with the movement of defendant's train, extra west, or any other train, drawn by its own locomotive engine No. 3666, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said

17th cause of action, the defendant is liable to the plaintiff in the sum of \$500.00, or any other sum.

XVIII.

Answering the 18th cause of action in said complaint, it denies that beginning at the hour of 6:15 o'clock P. M. on October 18th, 1912, upon its line of railroad, at or between the stations of Las Vegas, Nevada, and Otis, California, and within the jurisdiction of this court, or at any other place, it required or permitted its fireman, H. O. Johnson, to be or remain on duty, as such, or at all, for a longer period than 16 consecutive hours. [69]

Denies that the said Johnson was so on duty from said hour of 6:15 o'clock P. M. on October 18th, 1912, until the hour of 11:40 o'clock A. M. on October 19th, 1912, or longer than until the hour of 10:10 o'clock A. M., on said October 19th, 1912.

Denies that said fireman, H. O. Johnson, was required or permitted to be or remain on duty as set out in said 18th cause of action, or was engaged in or connected with the movement of the defendant's train, extra west, or any other train, drawn by its own locomotive engine No. 3666, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said 18th cause of action, the defendant is liable to the plaintiff in the sum of \$500.00, or any other sum.

XIX.

Answering the 19th cause of action of said complaint, it denies that beginning at the hour of 5:00 o'clock A. M. on October 27th, 1912, upon its line of

railroad, at or between the stations of Las Vegas, Nevada, and Otis, California, and within the jurisdiction of this court, or at any other place, it required or permitted its engineer, J. C. Frazier, to be or remain on duty, as such, or at all, for a longer period than 16 consecutive hours.

Denies that the said Frazier was so on duty from said hour of 5:00 o'clock A. M. on October 27th, 1912, until the hour of 11:00 o'clock P. M. of said date, or longer than until the hour of 8:55 o'clock P. M. on said October 27th, 1912.

Denies that said engineer, J. C. Frazier, was required or permitted to be or remain on duty as set out in said 19th cause of action, or was engaged in or connected with the movement of defendant's train, extra west, or any other train, drawn by its own locomotive engine No. 3668, the said train being then and there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said 19th cause [70] of action, the defendant is liable to the plaintiff in the sum of \$500.00, or any other sum.

XX.

Answering the 20th cause of action of said complaint, it denies that beginning at the hour of 5:00 o'clock A. M. on October 27th, 1912, upon its line of railroad, at or between the stations of Las Vegas, Nevada, and Otis, California, and within the jurisdiction of this court, or at any other place, it required or permitted its fireman, L. Cruncleston, to be or remain on duty as such or at all, for a longer period

than 16 consecutive hours.

Denies that said Crunclestone was so on duty from said hour of 5:00 o'clock A. M. on October 27th, 1912, until the hour of 11:00 o'clock P. M. of said date, or longer than until the hour of 8:55 o'clock P. M. on said October 27th, 1912.

Denies that said fireman, L. Crunclestone, was required or permitted to be or remain on duty as set out in said 20th cause of action, or was engaged in or connected with the movement of defendant's train, extra west, or any other train, drawn by its own locomotive engine No. 3668, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said 20th cause of action, the defendant is liable to the plaintiff in the sum of \$500.00, or any other sum.

XXI.

Answering the 21st cause of action of said complaint, it denies that beginning at the hour of 3:40 o'clock P. M. on October 31st, 1912, upon its line of railroad, at or between the stations of San Bernardino, California, and Ontario, California, and within the jurisdiction of this court, or at any other place, it required or permitted its engineer, Charles W. Madden, to be or remain on duty, as such, or at all, for a longer period than 16 consecutive hours.
[71]

Denies that the said Madden was so on duty from said hour of 3:40 o'clock P. M. on October 31st, 1912, until the hour of 10:00 o'clock A. M. on November

1st, 1912, or longer than until the hour of 7:40 o'clock A. M. on said November 1st, 1912.

Denies that said engineer, Charles W. Madden, was required or permitted to be or remain on duty as set out in said 21st cause of action, or was engaged in or connected with the movement of defendant's train, extra west, or any other train, drawn by its own locomotive engine No. 3627, the said train being then or there engaged in the movement of interstate traffic.

Denies that by reason of any facts alleged in said 21st cause of action, the defendant is liable to the plaintiff in the sum of \$500.00 or any other sum.

XXII.

That answering the 22d cause of action of said complaint, it denies that beginning at the hour of 3:40 o'clock P. M. on October 31st, 1912, upon its line of railroad, at or between the stations of San Bernardino, California, and Ontario, California, and within the jurisdiction of this court, or any other place, it required or permitted its fireman, Joe Glynn, to be or remain on duty, as such, or at all, for a longer period than 16 consecutive hours.

Denies that said Glynn was so on duty from said hour of 3:40 o'clock P. M. on October 31st, 1912, until the hour of 10:00 o'clock A. M. on November 1st, 1912, or longer than until the hour of 7:40 o'clock A. M. on said November 1st, 1912.

Denies that said fireman, Joe Glynn, was required or permitted to be or remain on duty as set out in said 22d cause of action, or was engaged in or connected with the movement of defendant's train,

extra west, or any other train, drawn by its own locomotive engine No. 3627, the said train being then or there engaged in the movement of interstate traffic.
[72]

Denies that by reason of any facts alleged in said 22d cause of action, the defendant is liable to the plaintiff in the sum of \$500.00, or any other sum.

WHEREFORE, the defendant having answered fully, demands judgment that the plaintiff take nothing by its said action, or causes of action, and that defendant recover its costs herein.

PENNEL CHERRINGTON,

Attorney for Defendant.

State of California,

County of Los Angeles,—ss.

W. H. Comstock, being first duly sworn, deposes and says that he is an officer of said defendant corporation, to wit, the Secretary thereof; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated upon his information and belief, and as to those matters he believes it to be true.

W. H. COMSTOCK.

Subscribed and sworn to before me, this 14th day of April, 1913.

[Seal]

FRANCIS J. MIEDING.

Notary Public.

Service of the foregoing answer is hereby ad-

mitted, and a copy thereof received, this 14th day of April, 1913.

HARRY R. ARCHBALD,
M. E. Y.,
Attorneys for Plaintiff.

[Endorsed]: No. 243 Civil. U. S. District Court, Ninth District, Southern District of California. The United States of America, Plaintiff, vs. S. P. L. A. & S. L. R. R. Co., a Corporation, Defendant. Answer. Filed Apr. 14, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Pen-nel Cherrington, 502-4 Pacific Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. [73]

[Order Consolidating Cases Nos. 106 and 243.]

At a stated term, to wit, the July Term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Monday, the 6th day of October, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable OLIN WELL-BORN, District Judge.

No. 243—Civil S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY, a Corporation,
Defendant.

Harry R. Archbald, Esq., Assistant U. S. Attorney, and Monroe C. List, Esq., Special Assistant U. S. Attorney, appearing as counsel for the United States; Pennel Cherrington, Esq., and F. R. McNamee, Esq., appearing as counsel for defendant; now, after the commencement of the trial in case No. 106 Civil, Southern Division, between the same parties, it is, on motion of Monroe C. List, Esq., Special Assistant U. S. Attorney, and with the consent of Pennel Cherrington, Esq., of counsel for defendant, ordered that this cause be, and the same hereby is consolidated with said cause No. 106 Civil S. D., and it is further ordered that the trial of said cause as consolidated proceed.

[Endorsed]: No. 243 Civil. United States District Court, Southern District of California, Southern Division. The United States of America, Plaintiffs, vs. San Pedro, Los Angeles & Salt Lake Railroad Company, Defendant. Copy Minute Order. Filed October 10, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [74]

[Verdict.]

In the District Court of the United States for Southern District of California, Southern Division.

Nos. 106 and 243—Civil, Consolidated.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY, a Corporation,
Defendant.

We, the jury in the above-entitled cause, under the instructions of the Court, find for the plaintiff in the 1st, 2d, and 3d causes of action alleged in Complaint in case No. 106 Civil, and each and every of the twenty-two causes of action alleged in Complaint in case No. 243 Civil, and for the defendant in the 4th cause of action alleged in Complaint in case No. 106 Civil.

Los Angeles, Cal., October 8th, 1913.

ISAAC B. NEWTON,
Foreman.

[Endorsed]: 106-243 Civil, Consolidated. U. S. District Court, Southern Dist. of Calif., Southern Division. United States vs. San Pedro, Los Angeles & Salt Lake Railroad Co. Verdict. Filed October 8, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [75]

[Judgment.]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

Nos. 106 and 243—Civil, Consolidated.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,

Defendant.

This cause having come on regularly for trial on the 6th day of October, 1913, being a day in the July Term, A. D. 1913, of the District Court of the United States for the Southern District of California, Southern Division, before the court and a jury of twelve (12) men duly impanelled; Harry R. Archbald, Esq., Assistant U. S. Attorney, and Monroe C. List, Esq., Special Assistant U. S. Attorney, appearing as counsel for the plaintiffs, and Pennel Cherrington, Esq., appearing as counsel for the defendant; and the fifth cause of action in case No. 106 Civil, having been, on said 6th day of October, dismissed; and the trial having been proceeded with on the 6th, 7th and 8th days of October, 1903, and witnesses having been sworn and examined, and documentary evidence having been introduced, and the evidence having been closed, and the cause after argument by counsel for the respective parties, and the instructions of the Court, having, on the said 8th day of October, 1913, been submitted to the jury, and the jury on the 8th day of October, 1913, having rendered the following verdict:

“In the District Court of the United States for Southern District of California, Southern Division.

Nos. 106 and 243, Civil, Consolidated.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY, a Corporation,
Defendant. [76]

We, the jury in the above-entitled cause, under the instructions of the Court, find for the plaintiff in the 1st, 2d and 3d causes of action alleged in Complaint in case No. 106 Civil, and each and every of the twenty-two causes of action alleged in Complaint in case No. 243 Civil, and for the defendant in the 4th cause of action alleged in Complaint in case No. 106 Civil.

Los Angeles, Cal., October 8th, 1913.

ISAAC B. NEWTON.

Foreman.”

—and the Court having pronounced judgment as follows, to wit: That the defendant pay a penalty of one hundred (100) dollars on each of the following causes of action in case No. 243 Civil, S. D., to wit: Causes of action numbers 1, 2, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22; that the defendant pay a penalty of one hundred and fifty (150) dollars on each of the following causes of action in case No. 243 Civil S. D., to wit: Causes of action

numbers 3, 4, 5, 6, 7, and 8; that the defendant pay a penalty of one hundred and fifty (150) dollars on each of the following causes of action in case No. 106 Civil S. D., to wit: Causes of action numbers 1, 2 and 3; and that defendant pay the costs in case No. 106 Civil, S. D., in case No. 243 Civil, S. D., and in the consolidated case Nos. 106 and 243 Civil, S. D.—

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that the United States of America, plaintiffs herein, have and recover of and from the San Pedro, Los Angeles & Salt Lake Railroad Company, defendant herein, the sum of Two Thousand Nine Hundred and Fifty Dollars (\$2,950.00), together with said plaintiffs' costs and disbursements in this behalf taxed at \$71.20.

Judgment entered October 10th, 1913.

WM. M. VAN DYKE,

Clerk.

By C. E. Scott,

Deputy Clerk. [77]

[Endorsed]: No. 106 and 243, Civil, Consolidated. United States District Court, Southern District of California, Southern Division. The United States of America, Plaintiffs, vs. San Pedro, Los Angeles & Salt Lake Railroad Company, Defendant. Copy of Judgment. Filed October 10, 1913. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [78]

[Certificate to Judgment and Judgment-roll.]

*In the District Court of the United States, for the
Southern District of California, Southern Division.*

Nos. 106 and 243—Civil, Consolidated.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,

Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a true copy of the Judgment entered in the above-entitled action, and recorded in Judgment Book 2 of said Court for the Southern Division, at page 227 thereof, and I further certify that the foregoing papers hereto annexed, constitute the Judgment-roll in said action.

ATTEST my hand and the seal of said District Court, this 10th day of October, A. D. 1913.

[Seal]

WM. M. VAN DYKE,

Clerk.

By C. E. Scott,

Deputy Clerk.

[Endorsed]: No. 106-243 Civil, Consolidated. In the District Court of the United States for the Southern District of California, Southern Division. The United States of America, vs. San Pedro, Los

Angeles & Salt Lake Railroad Co. Judgment-roll.
Filed October 10, 1913. Wm. M. Van Dyke, Clerk.
By C. E. Scott, Deputy Clerk. Recorded Judg. Register Book No. 2, page 227. [79]

[Order Denying Motion for New Trial.]

At a stated term, to wit, the July Term, A. D. 1913, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the twenty-ninth day of December, in the year of our Lord, one thousand nine hundred and thirteen. Present: The Honorable OLIN WELLBORN, District Judge.

Nos. 106 and 243—Civil, Consolidated.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES AND SALT LAKE
RAILROAD COMPANY,

Defendant.

This cause coming on this day to be heard on defendant's motion for a new trial; Harry R. Archbald, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; Pennel Cherrington, Esq., appearing as counsel for defendant; and this cause having been submitted to the Court for its consideration and decision, without argument, on said motion, it is now ordered that defendant's mo-

tion for a new trial be, and the same hereby is denied. [80]

*In the United States District Court in and for the
Southern District of California, Southern Division.*

No. 106—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,
Defendant.

No. 243—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

v.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,
Defendant.

Bill of Exceptions.

The above consolidated causes coming on regularly for trial, on October 6th, 1913, before the Honorable Olin Wellborn, Judge of the above-named court, and a jury duly empaneled and sworn, Messrs. Albert Schoonover, Harry R. Archbald and Monroe C. List, appearing for plaintiff, and Pennel Cherrington appearing for defendant, the following proceedings were had and testimony taken:

Stipulation [of Facts].

The following stipulation of facts was then read in evidence, (omitting title of court and causes):

Now come the plaintiff and defendant in the above-numbered and styled cause, by their respective attorneys, and in order to facilitate the trial of the same, enter into the following agreement:

The defendant may be permitted to make any affirmative defense under the plea filed by it in this cause, without the necessity of filing an amended answer. [81]

The following facts, which are agreed to be true in all particulars, may be admitted and read as evidence at the trial thereof:

1. The defendant is a corporation organized and doing business under the laws of the State of Utah and having an office and place of business at Los Angeles, Cal. It is, and was during the times mentioned in plaintiff's petition, a common carrier engaged in interstate commerce by railroad in the State of California,

Counts 1-2.

2. The defendant, on October 1 and 2, 1912, operated on its line of railroad from its station at Los Angeles, Cal., to Crestmore, Cal., and return, its certain freight train, known as Extra East and West, drawn by defendant's locomotive engine No. 3639, being the train mentioned in the 1st and 2d counts of plaintiff's petition, said train being at all times engaged in the movement of interstate traffic.

3. The defendant required and permitted its certain employees, to wit, locomotive engineer C. A. Cochrane and locomotive fireman A. B. Kleir, being the employees mentioned in the 1st and 2d counts, respectively, of said petition, to be and remain on duty as such and engaged in and connected with the movement of said train as follows:

4. Said train was scheduled to leave Los Angeles at 1:00 P. M., October 1, 1912. In compliance with defendant's rules and regulations, said employees reported for and went on duty at 12:30 P. M. on said date, at which time they began the work of looking after their engine and putting it in proper condition for road service, which character of service they performed until 1:34 P. M. on said date, at which time said train left Los Angeles.

5. For the purposes of this stipulation, the character of service above described will hereafter be designated as preparatory service.

6. From 1:34 P. M., on said date, until 4:30, the following morning, said employees were engaged in the work of operating said [82] engine in the movement of said train from Los Angeles to Crestmore, and thence back to Rowlands, Cal., at which last named place and time said train was tied up by defendant on account of the Federal 16 hour law, and the crew, with the exception of said engineer and fireman, relieved from duty and from all responsibility as to said train.

7. For the purpose of this stipulation, the character of service last described will hereafter be designed as road service.

8. From Rowlands said train, including engine 3639, was hauled to Los Angeles by another of defendant's engines, arriving there at 10:40 A. M., October 2, 1912, at which time and place said engineer and fireman were released from all service of whatsoever nature and from all responsibility for the performance of any kind of service.

9. Between Rowlands and Los Angeles said employees were not required to nor did they operate said engine for the purpose of hauling said train between those stations; nor were they charged with the present responsibility for the operation of said engine for the purpose of hauling said train should the occasion arise. They did not handle train orders during this period. Said employees, however, were required to remain on duty on their engine while it was being hauled in said train from Rowlands to Los Angeles, for the purpose of watching same, seeing that the fire was kept up, that the water did not get too low in the boiler, and that a certain amount of steam pressure was always maintained.

10. For the purposes of this stipulation, the character of service last described will hereafter be designated as watchman's service.

11. The continuous service, therefore, required of said employees in connection with said train on the above dates was 22 hours and 10 minutes, being divided or classified as follows: [83] 1 hour and 4 minutes preparatory service, 14 hours and 56 minutes road service, and 6 hours and 10 minutes watchmen's service.

Counts 9-10.

12. The defendant, on October 7 and 8, 1912, operated on its line of railroad from its station at San Bernardino, Cal., to Los Angeles, its certain freight train, known as extra west, drawn by defendant's locomotive engine No. 3617, being the train mentioned in the 9th and 10th counts of said petition, said train being at all times engaged in the movement of interstate traffic.

13. The defendant required and permitted its certain employees, to wit, locomotive engineer Chas. W. Madden and locomotive fireman Joe Glynn, being the employees mentioned in the 9th and 10th counts respectively, of said petition, to be and remain on duty from 2:30 P. M., October 7th, 1912, to 2:40 P. M., October 8, 1912, which period of 24 hours and 10 minutes of continuous service was in connection with said train, and was divided or classified as follows:

40 minutes preparatory service at San Bernardino.

15 hours and 20 minutes road service between San Bernardino and Pomona, Cal., where said train was tied up by defendant on account of the Federal 16 hour law, and

8 hours and 10 minutes service as watchman on said engine while said train was being hauled from Pomona to Los Angeles by another of defendant's engines.

Counts 11-12.

14. The defendant, on October 8 and 9, 1912, operated on its line of railroad from its station at Las Vegas, Nev., to Scott, Cal., its certain freight train,

known as extra west, drawn by defendant's locomotive engine No. 3617, being the train mentioned in the 11th and 12th counts of said petition, said train being at all times engaged in the movement of interstate traffic.

15. The defendant required and permitted its certain employees, to wit, locomotive engineer H. P. Mitchell and locomotive fireman, C. E. Caskey, being the employees mentioned in the 11th and [84] 12th counts, respectively, of said petition, to be and remain on duty from 5:00 P. M., October 8, 1912, to 10:30 A. M., October 9, 1912, which period of 17 hours and 30 minutes of continuous service was in connection with said train, and was divided or classified as follows:

40 minutes preparatory service at Las Vegas.

15 hours and 15 minutes road service between Las Vegas and Scott, where said train was tied up by defendant on account of the Federal 16 hour law, and

1 hour and 35 minutes service as watchman on said engine while waiting at Scott for relief crew.

Counts 13-14.

16. The defendant, on October 13 and 14, 1912, operated on its line of railroad from its station at Otis, Cal., to San Bernardino, its certain freight train, known as No. 81 and extra west, drawn by defendant's locomotive engine No. 3666, being the train mentioned in the 13th and 14th counts of said petition, said train being at all times engaged in the movement of interstate traffic.

17. The defendant required and permitted its

certain employees, to wit, Locomotive engineer O. A. Weeks and locomotive fireman Jess All, being the employees mentioned in the 13th and 14th counts, respectively, of said petition, to be and remain on duty from 8:45 P. M., October 13, 1912, to 3:55 P. M., October 14, 1912, which period of 19 hours and 10 minutes of continuous service was in connection with said train, and was divided or classified as follows:

6 hours and 50 minutes preparatory service, including delays at Otis to change engines, make repairs to same, and make up train;

8 hours and 55 minutes road service between Otis and Summitt, Cal., where said train was tied up by defendant on account of the Federal 16 hour law, and,

3 hours and 25 minutes service as watchman on said engine while [85] said train was being hauled to San Bernardino by another of defendant's engines.

Counts 15-16.

18. The defendant, on October 16 and 17, 1912, operated on its line of railroad from its station at San Bernardino to Pomona, its certain freight train, known as extra west, drawn by defendant's locomotive engine No. 3629, being the train mentioned in the 15th and 16th counts of said petition, said train being at all times engaged in the movement of interstate traffic.

19. The defendant required and permitted its certain employees, to wit, locomotive engineer J. G. Allison and locomotive fireman F. Thompson, being the employees mentioned in the 15th and 16th

counts, respectively of said petition, to be and remain on duty from 4:15 P. M., October 16, 1912, to 9:45 A. M. October 17, 1912, which period of 17 hours and 30 minutes of continuous service was in connection with said train, and was divided or classified as follows:

1 hour preparatory service at San Bernardino,
15 hours' road service between San Bernardino and Pomona, where said train was tied up by defendant on account of the Federal 16 hour law, and

1 hour and 30 minutes service as watchman on said engine while waiting at Pomona for relief crew.

Counts 17-18.

20. The defendant, on October 18 and 19, 1912, operated on its line of railroad from its station at Las Vegas to Otis, its certain freight train, known as extra west, drawn by defendant's locomotive engine No. 3666, being the train mentioned in the 17th and 18th counts of said petition, said train being at all times engaged in the movement of interstate traffic.

21. The defendant required and permitted its certain employees, to wit, locomotive engineer Joel V. Noblitt, and locomotive fireman H. O. Johnson, being the employees mentioned in the 17th and 18th counts, respectively, of said petition, to be and remain on [86] duty from 6:15 P. M., October 18, 1912, to 11:40 A. M., October 19, 1912, which period of 17 hours and 25 minutes of continuous service was in connection with said train, and was divided or classified as follows:

40 minutes preparatory service at Las Vegas,
15 hours and 15 minutes road service between Las Vegas and Harvard, Cal., where said train was tied up by defendant on account of the Federal 16 hour law, and
1 hour and 30 minutes service as watchman on said engine while said train was being hauled from Harvard to Otis by another of defendant's engines.

Counts 19-20.

22. The defendant, on October 27, 1912, operated on its line of railroad from its station at Las Vegas to Otis, its certain freight train, known as extra west, drawn by defendant's locomotive engine No. 3668, being the train mentioned in the 19th and 20th counts of said petition, said train being at all times engaged in the movement of interstate traffic.

23. The defendant required and permitted its certain employees, to wit, locomotive engineer J. C. Frazier and locomotive fireman L. Cruncleston, being the employees mentioned in the 19th and 20th counts, respectively of said petition, to be and remain on duty from 5:00 A. M., October 27, 1912, to 11:00 P. M., on said date, which period of 18 hours of continuous service was in connection with said train, and was divided or classified as follows:

1 hour and 15 minutes preparatory service at Las Vegas,
14 hours and 40 minutes road service between Las Vegas and Harvard, where said train was tied up by defendant on account of the Federal 16 hour law, and

2 hours and 5 minutes service as watchman on said engine while said train was being hauled from Harvard to Otis by another of defendant's engines.

Counts 21-22.

24. The defendant, on October 31, 1912, and November 1, 1912, [87] operated on its line of railroad from its station at San Bernardino, to Ontario, Cal., its certain freight train, known as extra west, drawn by defendant's locomotive engine No. 3627, being the train mentioned in the 21st and 22d counts of said petition, said train being at all times engaged in the movement of interstate traffic.

25. The defendant required and permitted its certain employees, to wit, locomotive engineer Chas. W. Madden and locomotive fireman Joe Glynn, being the employees mentioned in the 21st and 22d counts, respectively, of said petition, to be and remain on duty from 3:40 P. M., October 31, 1912, to 10:00 A. M., November 1, 1912, which period of 18 hours and 20 minutes of continuous service was in connection with said train, and was divided or classified as follows:

30 minutes preparatory service at San Bernardino,
15 hours and 30 minutes road service between San Bernardino and Ontario, where said train was tied up on account of the Federal 16-hour law, and,

2 hours and 20 minutes service as watchman on said engine while waiting at Ontario for relief crew.

[Testimony of Carl P. Smith, for Plaintiff.]

CARL P. SMITH, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

I am Chief Clerk of the Superintendent of the defendant railroad company. It is in my office that the records of the movement of trains are kept.

Train No. 1 referred to in the 3d, 4th, and 5th causes of action, in case No. 243, left Las Vegas, Nevada, on October 3d, 1912. It came from Salt Lake City, but on this Division it started at Las Vegas with its crew. The destination of the train was Los Angeles; it was a passenger train, and its conductor was G. D. Brown and the brakemen were R. A. Edwards and H. E. Henderson. On the 3d of October, 1912, they reported for duty at 5:00 P. M., the train leaving at 5:42 P. M. In the meantime they were engaged in preparatory work, going over their train, making inspection of the equipment, etc. These employees brought the train through to Los Angeles, and during all of the trip were connected with its movement. They reached Los Angeles at 8:00 P. M. October 4th, at which time they were released, having been in continuous service 27 hours. The train was not operated over our railroad the entire distance; under normal conditions the train would have gone from Las Vegas to Daggett over the Salt Lake road (the Sale Lake road, wherever mentioned, refers to the defendant), from Daggett to Colton over the line of the Santa Fe, from Colton to Riverside Junction over the Southern Pacific, and from there in over the Salt Lake road. We have a

(Testimony of Carl P. Smith.)

joint track contract with both the Santa Fe and Southern Pacific. The train in question came over our tracks from Las Vegas to Crucero, California. On account of land slides, this train was detoured to Ludlow over the Tonopah & Tidewater, and thence over the Santa Fe to Daggett, and from Daggett over the usual route. Las Vegas is 334 miles from Los Angeles. From Las Vegas to Crucero it is 129.9 miles; from Crucero to [89] Daggett it is 41.1 miles, and from Daggett to Los Angeles it is 158.6 miles. In detouring that day the train went approximately 28 extra miles; it is a little over 25 miles from Crucero to Ludlow, and 44.2 miles from Ludlow to Daggett. The train ran on its schedule from Las Vegas to Crucero, but from there on to Daggett probably as an extra, as it was not regularly scheduled over the Tonopah & Tidewater or the Santa Fe lines between the points mentioned. From Daggett on to Los Angeles, it was No. 1. The employees mentioned were in continuous service from the time they left Las Vegas until they arrived at Los Angeles. They were under our control from Las Vegas to Crucero, and then again after they left Riverside Junction.

The first division point west of Las Vegas is Otis, about 4 miles east of Daggett. That is a freight terminal and not a passenger terminal, though the freight crews at Otis were qualified as passenger crews. The train was delayed ten minutes at Daggett while a fresh engine crew was sent down from Otis to relieve the engineer and fireman, but there was

(Testimony of Carl P. Smith.)

no conductor or brakeman sent. There was no effort made to send down a conductor or brakeman from Otis. We had no crews available at Otis, that is, freight crews, when the train passed Daggett. There was no effort made at San Bernardino to release the conductor and brakemen. San Bernardino, for overland passenger trains, is not a terminal, though it is a freight terminal. It is also a passenger terminal for local passenger crews running between San Bernardino and Los Angeles. Those trains go to San Bernardino over the line of the Southern Pacific after leaving Riverside Junction. There was no effort made at San Bernardino to release the crew of No. 1, though it could have been done by sending a crew from Los Angeles. The crew could have been relieved at any point by sending out a crew from Los Angeles, provided we had means to get them there.

This train reached Crucero at 11:55 P. M. on October 3d; and [90] Ludlow at 6:15 A. M. October 4th, left Ludlow at 9:45 A. M. reached Daggett at 11:45 A. M. October 4th, leaving there at 11:55 A. M., and reached San Bernardino at 4:35 P. M. on October 4th.

Crucero, Ludlow and Daggett were telegraph stations, handled train orders, and were open when this train passed those points. This train was under the direction of the Chief Dispatcher at Los Angeles, but he would not know when the train arrived at or departed from Ludlow because of trouble with the telegraph wires as a result of weather conditions. He knew, however, when the train reached Daggett, and

(Testimony of Carl P. Smith.)

when it reached Daggett, he knew that it would be impossible to get to Los Angeles within the sixteen-hour period from the time it left Las Vegas. But notwithstanding that there was no effort made to send a crew from Otis to relieve it at San Bernardino, or to send a relief crew from Los Angeles.

Train No. 7, referred to in the 6th, 7th and 8th causes of action in case No. 243, was a limited passenger train, which left Las Vegas, Nevada, at 6:12 A. M., on October 4th. J. P. Fitzpatrick was the conductor, and J. S. Roberts and C. A. Carter were the brakemen. They went on duty at 5:30 A. M. October 4th, and from then until 6:12 they were engaged in preparatory work, as in the case of the crew of the other train. They brought the train into Los Angeles from Las Vegas, reaching Los Angeles at 6:28 A. M., October 5th, 1912, when they were relieved, having been in continuous service 24 hours and 55 minutes, during all of which time they were connected with the movement of the train. This train made the same detour as did train No. 1. It reached Daggett at 2:50 P. M. Oct. 4th. It left there at 3:35 P. M., and reached San Bernardino at 3:34 A. M., October 5th, after the 16-hour period had already expired.

I can't state what telegraph offices were open between Daggett and San Bernardino when that train passed, because though [91] they are joint offices, I have not their records and don't know their hours of service. There was no effort made to relieve the crew of this train at San Bernardino, though it could

(Testimony of Carl P. Smith.)

have been done by sending a crew from Los Angeles. Had there been freight crews available, the passenger crew could have been relieved with them as they were qualified for passenger service. Neither in the case of train No. 1, on October 3d and 4th, nor train No. 7, on October 4th and 5th, was any effort made to send relief crews from Los Angeles. The scheduled running time of No. 1 for October 3d and 4th, between Las Vegas and Los Angeles, was 13 hours and 30 minutes, and for No. 7, it was 11 hours and 28 minutes.

I am familiar with the stipulation concerning counts 1 and 2 and counts 9 to 22, inclusive. The purpose of keeping up a certain amount of steam on these engines was for convenience in lubricating.

When No. 1 left Las Vegas on the night of October 3d, it was not known that it would have to detour at Crucero. The train was delayed 1 hour and 30 minutes between Las Vegas and Crucero, by having to stop to pick up section and bridge men to repair the land slide which occurred between Crucero and Otis—to help clear the line for traffic. When the train left Las Vegas it was not known that it would have to pick up these men; it was not known until the train reached Jean, about 40 miles from Las Vegas. The land slide was on the main line between Crucero and Otis. Otis was a freight terminal; that is, a point at which freight train crews are relieved. There is a difference between a passenger train crew terminal and an engine crew terminal. A passenger train crew consists of a conductor and two brakemen,

(Testimony of Carl P. Smith.)

and an engine crew consists of an engineer and a fireman. Otis was not a terminal for passenger train crews, but was a terminal for passenger engine crews. San Bernardino was not a passenger train crew terminal for through service. [92]

When No. 1 got to Daggett, where it changed its engine crew instead of at Otis, as was usual, there were no freight crews available at Otis. They had been put in work train service and had gone to the land slide to help clear the line. When these two trains got to San Bernardino, there were no freight crews there; they had been sent out prior to the arrival of the train, in freight service. San Bernardino was not a passenger train crew terminal for through trains, but there were two local passenger train crews, which laid over there each night; they had only one brakeman each. The through trains ran from San Bernardino to Colton over the Santa Fe, but the two local crews ran from San Bernardino to Riverside Junction over the Southern Pacific, a different system of road and different road-bed from the Santa Fe. These local crews laying over at San Bernardino may have been familiar with the Santa Fe rules, but so far as I know, they never operated trains over the Santa Fe road.

Going back to train No. 1, leaving Las Vegas October 3d, this train was delayed at Crucero 55 minutes waiting for orders and the completion of arrangements to detour over the Tonopah & Tidewater road. This delay was not known when the train left Las Vegas. It was next delayed 2 hours and 10 minutes

(Testimony of Carl P. Smith.)

at Crucero by reason of finding a bridge washed out on the line of the Tonopah & Tidewater and having to return to Crucero until repairs could be made. This washout was not known of when the train left Las Vegas, nor when it left Crucero. This delay was 2 hours and 10 minutes. The train was delayed 1 hour and 35 minutes between Crucero and Ludlow on account of slow orders, due to light rails with which the Tonopah & Tidewater line was laid, and soft track as the result of rains. When that train left Las Vegas, we knew that that line was laid with light rail, but knew nothing of the other causes. We were always held down to about 15 miles an hour when detouring on the Tonopah & Tidewater, and we knew that when the train left Las [93] Vegas; that was the regular thing on account of the weight of our engines. When the train left Las Vegas we didn't know we had to detour; we did know, however, when No. 7 left Las Vegas, that it would have to detour. Before this we had frequently detoured passenger trains by way of Crucero and Ludlow. Ordinarily trains so detoured get to Los Angeles within the 16-hour period, barring unusual conditions, such as obtained in these cases.

Q. Now, then, going back, after Number 1 left Crucero, how much delay did you say there was between there and Ludlow?

A. 1 hour and 35 minutes.

Q. Now, did that include the fifteen-hour running time and shorter running time in some places because of weakened track?

(Testimony of Carl P. Smith.)

A. No, when I spoke of slow orders, I meant at points at which they held the train down in some places as low as 4 miles an hour by reason of the conditions which obtained.

That road (the Tonopah and Tidewater) had heavy rains the same as occurred on our line. We didn't know of or suspect these delays when the trains left Las Vegas. After the train left Las Vegas, heavy rains in the hills, severe electrical storms, and storm water running strongly in waterways, developed that were unknown of when the train left Las Vegas, and were unforeseen.

No. 1 was delayed at Ludlow 3 hours and 30 minutes, because the main line of the Santa Fe between Ludlow and Daggett was blocked by the derailment of a Santa Fe train, which necessitated that much delay. No. 1 got to Daggett at 11:45 A. M., about 17 hours and 5 minutes after leaving Las Vegas. It was already over the 16-hour period when it got to Daggett. I have no record of any delay between Daggett and Los Angeles.

No. 7 left Las Vegas on October 4th, at 6:12 A. M. and got to Daggett at 2:50 P. M., having detoured from Crucero. When it got to Daggett, it had been away from Las Vegas 8 hours and 38 minutes. The schedule running time of No. 7 from Daggett to Los Angeles is [94] 5 hours and 35 minutes, so that, had there been no delay encountered after No. 7 left Daggett, it would have gotten to Los Angeles within the 16-hour period. It was delayed, however, after leaving Daggett; it was delayed 24 minutes between

(Testimony of Carl P. Smith.)

Barstow and Victorville on account of a heavy wind-storm which retarded it below the running time. It was further delayed at Hesperia 8 hours and 18 minutes by reason of the main line of the Santa Fe joint track being blocked at Lugo by the derailment of a Santa Fe freight train. This could not have been foreseen when the train left Las Vegas, neither could the delay because of the wind. None of the delays I have testified to could have been foreseen when either No. 1 or No. 7 left Las Vegas. The derailment at Lugo was caused by a freight train breaking a car in two when pulling into a siding, that blocked the main line. I cannot give the exact time of the derailment because I haven't the Santa Fe record, but I am correct about the 8 hour and 18 minutes delay. No. 7 was further delayed ten minutes at Lugo where the derailment occurred, by reason of the main line being blocked by the wrecking outfit having in tow these derailed cars so that the train had to run into the siding and back out in order to get by. That delay could not have been foreseen when the train left Las Vegas. This is the last delay of which I have any record. Had it not been for the delays I have testified to, the train running the regular schedule time would have gotten to Los Angeles within the 16-hour period after leaving Las Vegas. The wreck at Lugo was not known of when No. 7 left Daggett and could not have been foreseen.

Neither one of the local passenger crews at San Bernardino would have been sufficient to run a

(Testimony of Carl P. Smith.)

through train; it would have been necessary to take a portion of both crews, and this would have tied up one, or perhaps both, of these local passenger trains until relief crews could have been sent from Los Angeles. It would have taken one local crew and a half to man one through [95] train, which would have laid out both of the local trains, and these trains carried mail.

Referring to No. 1, of October 3d and 4th, before the train left Las Vegas, it was known that there had been heavy rains in the canyon between Otis and Crucero, but the extent of damage was not known. It was at Jean, I think, that the train got orders to pick up section men. This was about 40 miles from Las Vegas. It was known then that there was considerable damage in the canyon. There was 55 minutes delay at Crucero, and then we were delayed 2 hours and ten minutes on account of the washout when the train went back to Crucero. The regular running time of the train was 13 hours and 30 minutes, and there was preparatory service of 30 minutes required of the crew, so that under normal conditions they would have been on duty 14 hours. Then, before getting to Crucero, 1 hour and 30 minutes was lost by picking up section men. We were delayed at Crucero the first time 55 minutes, and the second time 2 hours and ten minutes. The train left Crucero at 12:50 A. M. When the train left Crucero it was known that we could not get the train in and get the men off duty within the 16 hours, and we then knew that the train, when it

(Testimony of Carl P. Smith.)

detoured down to Ludlow, would have to come back on our own line at Daggett a few miles down. Notwithstanding that, there was no effort made to relieve the crew either at Daggett or San Bernardino or by sending out a relief crew from Los Angeles. When train No. 7 of Oct. 4th reached San Bernardino, the same situation existed. It was known that we could not get it in within the 16 hours, and yet no more effort was made to relieve that crew than there had been in the case of the other train.

When I say it would take one local crew and a half to man a through train, I referred to the State law of California which prohibits the movement of trains with more than four passenger cars with less than a conductor and two brakemen; these local [96] trains have less than four cars, and therefore, but one brakeman each. Of course, we knew how many cars were in No. 1 when it left Las Vegas, and it was known when it left Crucero that it could not get in within the 16 hours. I don't think there were any crews at either Otis or San Bernardino that we could rely on to take No. 7 in. The same conditions applied that night as it did next morning; there were no crews available next morning. We had regularly assigned crews at each terminal, and we kept men for emergencies at Las Vegas and Los Angeles, but not at Otis or San Bernardino. So far as I know, at that time the only place from which we could have gotten relief crews was Los Angeles. This applies to No. 1 on the 3d and No. 7 on the 4th.

Land slides and washouts between Daggett and

(Testimony of Carl P. Smith.)

Crucero are frequent. We have had a number of slides, but none which tied up the road previous to that time. We never had a serious one before. The seriousness of this one could not have been appreciated or known when No. 1 left Las Vegas. The bridge that was encountered on the Tonopah & Tidewater was about a quarter of a mile from Crucero, where they went back and waited until it was repaired—they waited at Crucero and didn't go back to Crucero after the bridge was repaired. Crucero was not a terminal of any kind, but simply a crossing of two railroads.

No. 1 left Crucero finally at 3:00 A. M. October 4th, and its running time from Crucero to Los Angeles was 8 hours and 35 minutes, that is, when there was no detouring. When we detour a train we run it part of the way over the line of some other road, and as a matter of practical operation, when you detour a train, you never can tell what delays will be encountered on the line of the other road, because while the train is on the line of the foreign company it is under the jurisdiction of the dispatchers of the foreign line. In the cases of trains Nos. 1 and 7, as a matter of fact, they were laid out while being detoured to give [97] the other line's trains precedence. After trains Nos. 1 and 7 left Crucero until they got to Colton, the dispatchers of the Salt Lake road had no jurisdiction over them. While on the Tonopah & Tidewater road, they were under the jurisdiction of that company's dispatchers, and after they left Ludlow until they reached Colton they were

(Testimony of Carl P. Smith.)

under the jurisdiction of the Santa Fe dispatchers. The Santa Fe dispatcher handling trains from Daggett to Colton is a joint dispatcher when the regular run of the train is handled by a dispatcher. It is not necessarily true that the road over whose line you detour trains gives a right of way to their trains over yours; that depends upon the importance of the train. In case of both these trains, the detour movement was over when they got to Daggett. The Salt Lake road had no joint dispatcher, either with the Tonopah & Tidewater, nor with the Santa Fe between Ludlow and Daggett, but from Daggett to Los Angeles a different condition prevailed, because there it was a joint track.

Referring to Case No. 106, and to the 1st, 2d and 3d causes of action, Kelso is 236 miles east of Los Angeles, and is between Crucero and Las Vegas. That was a continuous day and night office and was such in January, 1911. We had an operator there named J. H. Grandee, and one named W. T. Dugan. Mr. Grandee performed the duties of agent for the company, and also telegraph operator, handling train orders, messages, Western Union messages, express matter, mail. Mr. Dugan was a telegraph operator, using the telegraph line in receiving and transmitting telegraph orders, Mr. Grandee's hours of service at that station, on January 19th, 1911, was from 8:00 A. M. to 8:00 P. M. He worked continuously 12 hours that day. The orders he handled were pertinent to and affected the movement of trains coming from Nevada and also going from Cali-

(Testimony of Carl P. Smith.)

fornia to Nevada; they were regular interstate trains.

Referring to the second and third causes of action, Mr. Dugan on January 19th, 20th and 21st, 1911, was on duty from 8:00 P. M. [98] to 8:00 A. M., he was in service continuously 12 hours. He quit at 8:00 A. M. on the 20th, and went to work again at 8:00 P. M. on the 20th, and worked until 8:00 A. M. on the 21st, during which time he was engaged in handling the telegraph wires and delivering train orders that affected the movement of interstate trains.

Referring to the 4th cause of action, Otis is a continuous day and night office. J. B. Foster was operator there, one of them. His work was the same as that of the operator at Kelso; he was at the telegraph receiving and delivering train orders. On January 18th, 1911, he went on duty at 2:00 P. M. and worked until 4:30 A. M. January 19th, being in continuous service 14 hours and 30 minutes as a telegraph operator. At Kelso there were three operators regularly employed. The two men were kept on overtime because one of the operators, W. F. Starkey became ill on January 16th. At this time the office at Kelso was under the supervision of the chief dispatcher at Las Vegas. When Starkey was taken ill and the chief dispatcher at Las Vegas was apprised of the fact, he wired to Los Angeles on the morning of the 17th, asking for a relief operator. He wired the Superintendent of Telegraph, who employs the telegraph operators. The Superintendent

(Testimony of Carl P. Smith.)

of Telegraph did not secure a man to take Starkey's place at Kelso, and on the evening of the 17th, the dispatcher at Las Vegas borrowed an operator who was employed in the Las Vegas telegraph office, and started him to Kelso that night. This was the first train from Las Vegas to Kelso after it was learned a man could not be gotten from Los Angeles. When the train reached Lyons, a point between Kelso and Las Vegas, it was derailed and turned over, damaging the equipment and blocking the main line, injuring 14 passengers. The operator who was on this train No. 1, was instructed by the Chief Dispatcher to establish a telegraph office at the wreck in order that he could communicate with headquarters and report conditions and progress there, and enable the dispatcher to move the trains [99] around the wreck when the line was clear. In establishing an office on the line at a wreck, this is a practice we follow on all occasions, as it enables us to clear the line much more quickly. This operator established an office at the wreck and remained until relieved on the evening of January 19th, the Chief Dispatcher at Las Vegas having employed a man to relieve him and sent him out on No. 1 to the wreck. The operator who had been working at the wreck, boarded the same train on which the relief men arrived and went to Kelso. In view of the shortage of help, I would say that a substitute operator was sent to Kelso as expeditiously as could have been done to take the place of Starkey. At that time telegraph operators were extremely scarce.

(Testimony of Carl P. Smith.)

The Western Union and Postal Companies were using a great many operators, and the men preferred to work in Los Angeles rather than go to the desert points, such as Kelso and Otis; they are both in the desert. At that time we had difficulty in getting operators to go there.

The reason for keeping operator Foster on duty 14 and a half hours at Otis on that day was this: Otis is a continuous telegraph office and there were three operators during the 24-hour period. On January 17th, one of these operators, Casey by name, went on duty at the usual time, 10 P. M., apparently in good condition. About 1:20 A. M. January 18th, it was discovered that Casey was under the influence of liquor. He was relieved from duty and operator C. H. Perry called to take his place. He worked continuously until 2:00 P. M. January 18th, making a period of service of 12 hours and 40 minutes consecutively. At 2:00 P. M. Perry was relieved by Foster, who remained on duty until 4:30 A. M. January 19th, a period of 14 hours and 30 minutes, or 1 hour and 30 minutes in excess of the time allowed; that is, in excess of the 13 hours allowed in emergency. He was kept on duty because when Casey became intoxicated and the fact was known that he was to be relieved from duty, operator Williams was employed at Daggett to [100] fill the vacancy; that was during the day of January 18th. He had instructions to go to Otis on No. 2, due to arrive at Otis at 2:45 A. M. January 19th. He failed to put in an appearance when the train arrived, and oper-

(Testimony of Carl P. Smith.)

ator Foster, who was then on duty, sent a messenger for operator Perry to go on duty to relieve him. Had Williams arrived on No. 2 and immediately relieved Foster, Foster's hours of service would have been 12 hours and 45 minutes. It was not known before the train got there that Williams would not arrive on it. The arrangements to send him there were made as soon as the discharge of Casey was known. Mr. Williams' statement after his arrival was that he had become suddenly ill prior to the arrival of his train at Daggett, the one he was intending to take. As soon as it was known that Williams would not come on that train, Perry was gotten to the office to relieve Foster as soon as it was practicable. He had to be called from his sleep. The telegraph office at Otis at that time could not have been closed without interfering with the operation of the road, and the same thing was true of Kelso at the time of the alleged violations. This was a helper terminal; that is, a point where they call helper engines to assist both freight and passenger trains up the mountain.

Referring to the case of trains that were towed in, of which I spoke in my testimony, about keeping up steam for purposes of lubrication, that meant that as long as an engine is under steam or not, the lubrication boxes or valves are taken care of automatically, but when the engine becomes cold the lubrication must be done by hand, and it was to save hand labor that the steam was kept up, and for no other purpose.

(Testimony of Carl P. Smith.)

Referring to the detoured trains 1 and 7, they both carried the United States mail. Las Vegas was a terminal from which they started their runs on the occasions in question, and the next terminal for these trains was Los Angeles. That was the condition that prevailed at the time in question. [101]

Running over the regular run, the distance from Las Vegas to Los Angeles is 334 miles. The schedule running time of train No. 1 from Las Vegas to Los Angeles was 13 hours and 30 minutes, and the running time of No. 7 between the same points was 11 hours and 28 minutes. Under normal conditions neither train ever had any difficulty in getting to Los Angeles on time, as provided by the schedule.

The local trains I spoke of, running between Los Angeles and San Bernardino, entered and left San Bernardino on the Southern Pacific track by reason of a joint track agreement with that Company. That road was separate and distinct from the Santa Fe, over which Nos. 1 and 7 arrived at and left San Bernardino. After leaving Las Vegas, the next passenger terminal for trains 1 and 7 was Los Angeles, that is to say, the passenger crews of these trains ran regularly from Las Vegas to Los Angeles, and *vice versa*.

Referring to the first cause of action in case No. 106, on January 19th, 1911, which was Thursday of that week, operator *Grande* worked 12 hours; it is also true that on Monday, the 16th, Tuesday, the 17th, and Wednesday the 18th, Mr. *Grande* was required to work 12 hours each day. It is also true

[(Testimony of Carl P. Smith.)

that Mr. Dugan was required to work from 8:00 P. M. on the 16th of that month, to 8:00 A. M. of the 17th, and he was also required to work that length of time on Monday of that week. It is also true that he was required to work from 8:00 P. M. of the 17th, to 8:00 A. M. of the 18th, a period of 12 hours. It is also true that from 8:00 P. M. of the 18th, to 8:00 A. M. of the 19th, Mr. Dugan was required to work 12 hours. So that he worked on Monday, Tuesday, Wednesday, Thursday and Friday 12 hours each.

On the entire road from Salt Lake City to Los Angeles, there were at that time 71 telegraph offices, and in them there were employed 106 operators. A great many of them were 3-men offices, continuously operated, and others were two-men offices. They [102] were three-men offices where they were continuously operated. At that time we kept no standing list of reserve operators to relieve regular operators. If a man got sick and quit work, we had to trust to finding someone from off the line to take his place, or depend upon employing one for that purpose.

In the case of Mr. Foster at Otis, named in the 4th cause of action, Foster and Perry could have arranged to work 12 hours each for the three days until we could relieve them, but on the day Foster performed this excess service of 1 hour and 30 minutes over the 12 hours, had he known that his relief would not arrive on No. 2, the second operator would have been called at the expiration of the 12 hours. This

(Testimony of Carl P. Smith.)

arrangement would have been made if we had known that operator Williams would not arrive. Williams, who was to come from Daggett, was not employed by the company at Daggett; he was a new man that we picked up. No other effort was made by the Superintendent of Telegraph to see that Williams actually went on the train, other than that he had Williams' assurance that he would go, but to my knowledge there was no effort made to see that he actually did go.

Referring to train No. 7, in case No. 243, I have no record of the hours of service of the operator at Hesperia. I don't think that Lugo, where the wreck occurred, was a day and night office, and I can't state the exact hour when the wreck occurred—I should say about 4 P. M. October 4th,—may be a little bit later, about 5 P. M. I fixed that time from the arrival of No. 7 at Hesperia, which was 5:35 P. M. It left there about 1:53 A. M. the following day. The running time from Hesperia to San Bernardino was 25 minutes. It is a fact that when we knew these trains were going to exceed the 16-hour limit, we could have gotten relief for them by sending men out from Los Angeles.

There was no further or additional testimony introduced at the trial. [103]

Whereupon the Court gave to the jury the following instruction:

[Instruction of the Court to the Jury.]

The COURT.—In the two cases, gentlemen of the jury, of the United States of America against San

Pedro, Los Angeles & Salt Lake Railroad Company—one of them is numbered 106 and the other 243—which, by reason of their consolidation, have been tried together, the facts are agreed upon. There is no controversy but that in all of the cases mentioned in the complaint—both complaints—the employees named in each count were permitted to remain on service for periods longer than those allowed by the statute. In each case the defendant has sought to justify the detention or the allowing of these employees to remain on service. The facts are agreed upon, and hence it is a matter of law for the Court to determine. And upon these agreed facts I shall hold, and do hold, as matter of law, that none of the defenses to any of the causes of action, except the fourth cause of action in complaint number 106, are good. The Court therefore instructs you—and it is your duty to obey the instructions of the Court—to find in favor of the plaintiff on each count of the complaint in each case, except the fourth count or the fourth cause of action in the complaint in case 106, and on that cause of action you will return a verdict in favor of the defendant. Submit the form of verdict to the jury, and let one of your number be selected as foreman and let him sign the verdict.

And the Court gave to the jury no further or other instruction.

And the defendant then and there, while the jury were in the box, excepted separately to such instruction to the jury as directed them to find for the plaintiff in each cause of action stated in the two

cases, except that part of said instruction as directed the jury to find for the defendant. [104]

Exception No. 1.

In the two cases, gentlemen of the jury, of the United States of America against San Pedro, Los Angeles & Salt Lake Railroad Company—one of them is numbered 106 and the other 243—which, by reason of their consolidation, have been tried together, the facts are agreed upon. There is no controversy but that in all of these cases mentioned in the complaint—both complaints—the employees named in each count were permitted to remain on service for periods longer than those allowed by the statute. In each case the defendant has sought to justify the detention or the allowing of these employees to remain on service. The facts are agreed upon, and hence it is a matter of law for the Court to determine. And upon these agreed facts I shall hold, and do hold, as matter of law, that none of these defenses to any of these causes of action, except the fourth cause of action in complaint number 106, is good. The Court therefore instructs you—and it is your duty to obey the instructions of the Court—to find in favor of the plaintiff on each count of the complaint in each case except the fourth count or the fourth cause of action in the complaint in case 106, and on that cause of action you will return a verdict in favor of the defendant. Submit the form of verdict to the jury, and let one of your number be selected as foreman and let him *sich* the verdict.

And the defendant then and there, while the jury were in the box, excepted separately to such instruc-

tion to the jury as directed them to find for the plaintiff in each cause of action stated in the two cases, except that part of said instruction as directed the jury to find for the defendant.

Thereupon the jury returned a verdict in favor of the plaintiff in words and figures as follows:

“In the District Court of the United States, for the Southern District of California, Southern Division.

Nos. 106 and 243, Consolidated.

THE UNITED STATES OF AMERICA,

Plaintiffs,

versus

SAN PEDRO, LOS ANGELES & SALT LAKE
[105] RAILROAD COMPANY, a Corporation,

Defendant.

We, the jury in the above-entitled cause, under the instructions of the Court, find for the plaintiff in the first, second and third cause of action alleged in complaint in case No. 106, Civil, and each and every of the twenty-two causes of action alleged in complaint in case No. 243, Civil, and for the defendant in the fourth cause of action alleged in complaint in case No. 106, Civil.

Los Angeles, California, October 8th, 1913.

ISAAC B. NEWTON,
Foreman.”

The foregoing, containing all the evidence offered at the trial of said causes, and the instructions of the Court to the jury, with the defendant's exception

thereto, and containing all the proceedings on the trial of said causes, to and including the verdict of the jury, is hereby offered as the defendant's proposed Bill of Exceptions.

PENNEL CHERRINGTON,
Attorney for Defendant.

Service of the foregoing Bill of Exceptions accepted, and a copy thereof received this 28th day of February, 1914.

ALBERT SCHOONOVER,
U. S. Attorney,
MONROE C. LIST,
Spec'l Asst. U. S. Attorney,
HARRY R. ARCHBALD,
Asst. U. S. Attorney,
Attorneys for Plaintiff. [106]

[Stipulation for Settlement and Allowance of Bill of Exceptions.]

It is hereby stipulated that the foregoing Bill of Exceptions is a true and correct Bill of Exceptions, and that the same may be settled and allowed by the Court.

Dated this 3d day of March, 1914.

ALBERT SCHOONOVER,
U. S. Attorney,
MONROE C. LIST,
Spec'l. Asst. U. S. Atty.,
HARRY R. ARCHBALD,
Asst. U. S. Atty.,
Attorneys for Plaintiff.

[Order Settling and Allowing Bill of Exceptions.]

The foregoing Bill of Exceptions, containing all of the evidence offered and introduced at the trial of said cause, and the instructions of the Court to the jury, with the defendant's exceptions thereto, and containing all of the proceedings at the trial of said cause, to and including the verdict of the jury, is a true and correct Bill of Exceptions, and is hereby settled and allowed, and ordered to be filed.

Dated this 4th day of March, 1914.

OLIN WELLBORN,
Judge.

[Endorsed]: No. 106, 243, Civil. U. S. District Court, Ninth District, Southern District of California. The United States of America, Plaintiff, vs. San Pedro, Los Angeles & Salt Lake Railroad Co., Defendant. Engrossed Bill of Exceptions. Filed Mar. 4, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Pennel Cherrington, 502-4 Pacific Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. [107]

[Defendant's Exhibit—The Hours-of-Service Law.]**INTERSTATE COMMERCE COMMISSION.
THE HOURS-OF-SERVICE LAW AND AD-
MINISTRATIVE RULINGS AND OPIN-
IONS THEREON.**

Printed by Order of the Commission March 25,
1912.

106-243 Civil.

U. S.

vs.

S. P. L. A. & S. L. Rd. Co.

Filed October 7, 1913.

Defendants Exhibit.

Wm. M. Van Dyke, Clerk,

By C. E. Scott,

Deputy Clerk.

Washington,
Government Printing Office,
1912.

[108]

**THE INTERSTATE COMMERCE COMMIS-
SION.**

CHARLES A. PROUTY, of Vermont.

JUDSON C. CLEMENTS, of Georgia.

FRANKLIN K. LANE, of California.

EDGAR E. CLARK, of Iowa.

JAMES S. HARLAN, of Illinois.

CHARLES C. McCHORD, of Kentucky.

BALTHASER H. MEYER, of Wisconsin.

JOHN H. MARBLE, Secretary. **[109]**

THE HOURS-OF-SERVICE LAW.

An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon. (34 Stat. L., ch. 2939, pp. 1415, 1416.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "employees" as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.

SEC. 2. That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such

employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive [110] hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty: Provided, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or

34174-12

remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period of not exceeding three days in any week: Provided further, The Interstate Commerce Commission may after full hearing in a particular case and for a good cause shown extend the period within which a common carrier shall comply with the provisions of this proviso as to such case.

Sec. 3. That any such common carrier, or any officer or agent thereof, requiring or permitting any

employee to go, be, or remain on duty in violation of the second section hereof, shall be liable to a penalty of not to exceed five hundred dollars for each and every violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon satisfactory information being lodged with him; but no such suit shall be brought after the expiration of one year from the date of such violation; and it shall also be the duty of the Interstate Commerce [111] Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge. In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents: Provided, That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen: Provided further, That the provision of this act shall not apply to the crews of wrecking or relief trains.

Sec. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provision of this act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act.

Sec. 5. That this act shall take effect and be in force one year after its passage.

Public, No. 274, approved March 4, 1907, 11:50 a. m.

CONFERENCE RULINGS ON THE HOURS-OF-SERVICE LAW BY THE COMMISSION.

April 7, 1908.

56. HOURS-OF-SERVICE LAW—STREET-CAR COMPANIES.—Upon inquiry whether the hours-of-service law applies to electric street-car lines which are interstate carriers: Held, That it applies to all railroads subject to the provisions of the act to regulate commerce, as amended, including street railroads when engaged in interstate commerce. (See Rule 287.)

May 5, 1908.

74. HOURS-OF-SERVICE LAW.—Employees deadheading on passenger trains or on freight trains and not required to perform, and not [112] held responsible for the performance of, any service or duty in connection with the movement of the train upon which they are deadheading, are not while so deadheading “on duty” as that phrase is used in the act regulating the hours of labor. (See Rule 287-b.)

June 25, 1908.

88. HOURS-OF-SERVICE LAW.—(a) The specific proviso of the law in regard to hours of service is:

“That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers

orders pertaining to or affecting train movements, shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period *on* not exceeding three days in any week."

These provisions apply to employees in towers, offices, places, and stations, and do not include train employees who, by the terms of the law, are permitted to be or remain on duty sixteen hours consecutively or sixteen hours in the aggregate in any twenty-four-hour period, and who may occasionally use telegraph or telephone instruments for the receipt or transmission of orders affecting the movement of trains. (See Rule 287.)

(b) Section 3 of the law provides that:

"The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where [113] the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen."

Any employee so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law

to that trip. (See Rule 287.)

November 10, 1908.

108. HOURS-OF-SERVICE LAW—FERRY EMPLOYEES.—The hours-of-service law does not apply to employees on a ferry, even though the ferry be owned by a railroad company. The law applies to employees connected with the movement of trains, and hence does not embrace employees engaged only in the operation of a ferry. This ruling does not apply to car ferries. (See Rule 287.)

April 4, 1910.

275. HOURS-OF-SERVICE LAW — TRAIN BAGGAGEMEN.—The provisions of section 1 of the hours-of-service law apply to train baggagemen who are employees of the railway company and who are required by the rules of the company to perform or to hold themselves in readiness, when called upon, to perform any duty connected with the movement of any train. (See Rules 74 and 287.)

March 16, 1908.

287. THE HOURS-OF-SERVICE LAW.—(a) The provisions of this act apply to all common carriers by railroad in the District of Columbia, or in any Territory of the United States, or engaged in the movement of interstate or foreign traffic; and to all employees of such common carriers who are engaged in or connected with the movement of any train carrying traffic in the District of Columbia, or in any Territory, or carrying interstate or foreign traffic. (See Rule 56.)

(b) Sec. 2. The requirement for ten consecutive hours off [114] duty applies only to such em-

ployees as have been on duty for sixteen consecutive hours. The requirement for eight consecutive hours off duty applies only to employees who have not been on duty sixteen consecutive hours, but have been on duty sixteen hours in the aggregate out of a twenty-four-hour period. Such twenty-four-period begins at the time the employee first goes on duty after having had at least eight consecutive hours off duty. The term "on duty" includes all the time during which the employee is performing service, or is held responsible for performance of service. An employee goes "on duty" at the time he begins to perform service or at which he is required to be in readiness to perform service, and goes "off duty" at the time he is relieved from service and from responsibility for performance of service. (Qualified by Rule 74.)

(c) The act does not specify the classes of employees that are subject to its terms. All employees engaged in or connected with the movement of any train as described in section 1 are within its scope. Train dispatchers, conductors, engineers, telegraphers, firemen, brakemen, train baggagemen who, by rules of carriers, are required to perform any duty in connection with the movement of trains, yardmen, switch-tenders, tower-men, block-signal operators, etc., come within the provisions of the statute. (Qualified by Rules 108 and 275; see also Rule 88.)

(d) The proviso in section 2 covers every employee who, by the use of the telegraph or telephone, handles orders pertaining to or affecting train move-

ments. In order to preserve the obvious intent of the law this provision must be construed to include all employees, who, by the use of an electrical current, handle train orders or signals which control movements of trains. (See Rule 88.) [115]

(e) The prime purpose of this law is to secure additional safety by preventing employees from working longer hours than those specified in the act. Therefore a telegraph or telephone operator who is employed in a night and day office may not be required to perform duty in any capacity or of any kind beyond nine hours of total service in any twenty-four-hour period.

(f) The phrase "towers, offices, places, and stations" is interpreted to mean particular and definite locations. The purpose of the law and of the proviso for nine hours of service may not be avoided by erecting offices, stations, depots, or buildings in close proximity to each other and operating from one a part of the day while the other is closed, and *vice versa*.

The statute is remedial in its intent and must have a broad construction, so that the purpose of the Congress may not be defeated.

(g) The Commission interprets the phrase "continuously operated night and day" as applying to all offices, places, and stations operated during a portion of the day and a portion of the night a total of more than thirteen hours.

The phrase "operated only during the daytime" refers to stations which are operated not to exceed thirteen hours in a twenty-four-period, and is not

considered as meaning that the operator thereat may be employed only during the daytime.

(h) The act provides that operators employed at night and day stations or at daytime stations may in case of emergency be required to work four additional hours on not exceeding three days in any week. Manifestly, the emergency must be real and one against which the carrier cannot guard.

“In any week” is construed to mean in any calendar week, beginning with Sunday.

(i) Sec. 3. The instances in which the act will not apply [116] include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point. (See Rule 88.)

“Casualty,” like its synonyms “accident” and “misfortune,” may proceed or result from negligence or other cause known or unknown. (Words and Phrases Judicially Defined, vol. 2, 1003.)

Act of God. Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight, and pains, and care reasonable to have been expected. (Bouvier’s Law Dictionary, vol. 1, 79.)

(j) It will be noted that the penalties for violation of this act are against the “common carriers, or any officer or agent thereof, requiring or permitting any employee to go, be, or remain on duty” in

violation of the law. It is clear that the officers and agents of carriers who are liable to the penalties provided in the act are those who have official direction or control of the employees; and that the penalties do not attach to the employees who, subject to such supervision or control, perform the service prohibited.

(k) Sec. 4. To enforce this act the Interstate Commerce Commission has all the powers which have been granted to it for the enforcement of the act to regulate commerce, including authority to appoint employees, to require reports, to examine books, papers, and documents, to administer oaths, to issue subpoenas, and to interrogate witnesses. [117]
February 12, 1912.

342. HOURS-OF-SERVICE LAW.—A trainman required by the rules of the carrier, in conjunction with his duties as trainman, to send, receive or deliver orders affecting the movement of trains comes within the proviso of section 2 of the hours-of-service act, and therefore a carrier may not require a trainman, who has been on duty longer than the limit of time fixed for a telegraph or telephone operator, to send, receive, or deliver orders affecting the movement of trains as a part of the duties regularly assigned to him.

But upon inquiry whether the practice of requiring conductors of trains delayed at stations where there is no regularly assigned telegraph or telephone operator on duty, and conductors of trains about to be overtaken by superior trains, to telephone or telegraph the train dispatcher for instructions is in ac-

cord with the act and with the Commission's order of interpretation of June 25, 1908, Held, That a trainman who has been on duty for more than 9 hours or for more than 13 hours is not prohibited from occasionally using the telegraph or telephone to meet an emergency. [118]

*In the United States District Court for the Southern
District of California, Southern Division.*

(Consolidated.)

No. 106—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,
Defendant.

No. 243—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,
Defendant.

Assignment of Errors.

Comes now the defendant, San Pedro, Los Angeles & Salt Lake Railroad Company, and files the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above-en-

titled causes, petition for which writ of error is filed at the same time with this assignment of errors.

I.

The Trial Court erred in instructing the jury as follows:

“In the two cases, gentlemen of the jury of the United States of America against San Pedro, Los Angeles & Salt Lake Railroad Company—one of them is numbered 106 and the other 243—which, by reason of their consolidation, have been tried together, the facts are agreed upon. There is no controversy but that in all of the cases mentioned in the complaint—both complaints—the employees named in each count were permitted to remain on service for periods longer than those allowed by the statute. In each case the defendant has sought to justify the detention or the allowing of these employees to remain on service. The facts are agreed upon, and hence it is a matter of law for the Court to determine. [119] And upon these agreed facts I shall hold, and do hold, as matter of law, that none of the defenses to any of the causes of action, except the fourth cause of action in complaint number 106, are good. The Court therefore instructs you—and it is your duty to obey the instructions of the Court—to find in favor of the plaintiff on each count of the complaint in each case, except the fourth count or the fourth cause of action in the complaint in case 106, and on that cause of action you will return a verdict in favor of the defendant. Submit the form of verdict to the jury, and let one of your number be selected as foreman and let him sign the verdict.”

II.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the first cause of action in case 106.

III.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the second cause of action in case 106.

IV.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the third cause of action in case 106.

V.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 1st cause of action in case 243.

VI.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 2nd cause of action in case 243. [120]

VII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 3d cause of action in case 243.

VIII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 4th cause of action in case 243.

IX.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 5th cause of action in case 243.

X.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 6th cause of action in case 243.

XI.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 7th cause of action in case 243.

XII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 8th cause of action in case 243.

XIII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 9th cause of action in case 243.

XIV.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 10th cause of action in case 243. [121]

XV.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 11th cause of action in case 243.

XVI.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 12th cause of action in case 243.

XVII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 13th cause of action in case 243.

XVIII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 14th cause of action in case 243.

XIX.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 15th cause of action in case 243.

XX.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 16th cause of action in case 243.

XXI.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 17th cause of action in case 243.

XXII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 18th cause of action in case 243. [122]

XXIII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 19th cause of action in case 243.

XXIV.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 20th cause of action in case 243.

XXV.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 21st cause of action in case 243.

XXVI.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 22d cause of action in case 243.

XXVII.

The Court erred in overruling and denying the defendant's motion for a new trial.

PENNEL CHERRINGTON,

Attorney for Defendant.

And upon the foregoing assignment of errors, and upon the record in said causes, the defendant **prays** that said verdict and judgment be reversed.

Dated March 31, 1914.

PENNEL CHERRINGTON,

Attorney for Defendant. [123]

Service of the foregoing Assignment of Errors is hereby admitted, and a copy thereof received, this 2nd day of April, 1914.

ALBERT SCHOONOVER,

U. S. Atty.,

HARRY R. ARCHBALD,

Asst. U. S. Atty.,

Attorneys for Plaintiff.

[Endorsed]: No. 106 and 243 Cons. U. S. District Court, Ninth District, Southern District of California. United States of America, Pl., vs. San Pedro, Los Angeles and Salt Lake R. R. Co., Defendant. Assignment of Errors. Filed Apr. 2, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Pennel Cherrington, 502-4 Pacific Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. [124]

*In the United States District Court for the Southern
District of California, Southern Division.*

(Consolidated.)

No. 106—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,
Defendant.

No. 243—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,
Defendant.

Petition for Writ of Error and Supersedeas.

San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation, defendant in the above-entitled consolidated causes, feeling itself aggrieved by the verdict of the jury and the judgment entered on October 8th, 1913, comes now, by Pennel Cherrington, its Attorney, and files herewith an Assignment of Errors, and petitions said Court for an order allowing said defendant to procure a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the

United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the termination of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

Dated, March 31, 1914.

PENNEL CHERRINGTON,
Attorney for Defendant. [125]

Service of the within Petition is hereby admitted, and a copy thereof received, this 2d day of April, 1914.

ALBERT SCHOONOVER,
U. S. Atty.,
HARRY R. ARCHBALD,
Asst. U. S. Atty.,
Attorneys for Plaintiff.

[Endorsed]: No. 106 and 243, Cons. U. S. District Court, Ninth District, Southern District of California. United States of America, Plaintiff, vs. San Pedro, Los Angeles and Salt Lake R. R. Co., Defendant. Petition for Writ of Error and Supersedeas. Filed Apr. 2, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Pennel Cherrington, 502-4 Pacific Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. [126]

*In the United States District Court for the Southern
District of California, Southern Division.*

(Consolidated.)

No. 106—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,
Defendant.

No. 243—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,
Defendant.

Order Allowing Writ of Error.

Upon motion of Pennel Cherrington, attorney for defendant, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be, and hereby is, allowed to have reviewed in the United States Circuit Court for the Ninth Circuit, the verdict and judgment heretofore entered herein.

Dated April 2d, 1914, at Chambers.

OLIN WELLBORN,
Judge.

Service of the above Order is hereby admitted, and a copy thereof received, this 2d day of April, 1914.

ALBERT SCHOONOVER,

HARRY R. ARCHBALD,

Attorneys for Plaintiff.

[Endorsed]: No. 106 and 243, Cons. U. S. District Court, Ninth District, Southern District of California. United States of America, [127] Pl., vs. San Pedro Los Angeles and Salt Lake R. R. Co., Defendant. Order Allowing Writ of Error. Filed Apr. 2, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Pennel Cherrington, 502-4 Pacific Electric Bldg., Los Angeles Cal., Solicitor for Defendant. [128]

*In the United States District Court for the Southern
District of California, Southern Division.*

(Consolidated.)

No. 106—Civil.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,

Defendant.

No. 243—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,
Defendant.

Order Staying Proceedings.

The defendant, San Pedro, Los Angeles & Salt Lake Railroad Company, having this day filed its petition for a writ of error from the verdict and judgment made and entered herein to the United States Circuit Court of Appeals for the Ninth Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of the security which the defendant should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings of this Court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals, and said petition having this day been duly allowed—

NOW, THEREFORE, it is ordered that upon said defendant filing with the Clerk of this Court a good and sufficient bond in the sum of Six Thousand Dollars (\$6,000.00), to the effect that if the said defendant and plaintiff in error shall prosecute the said writ of error with effect and answer all damages and costs if it fails to make its plea good, then the said obligation to be void, else to remain in full force and

virtue, the said Bond to be approved by the clerk of this Court, that all further proceedings [129] in this Court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals.

Dated, April 2d, 1914, at Chambers.

OLIN WELLBORN,
Judge.

Service of a copy of the above order is hereby admitted, this 2d day of April, 1914.

ALBERT SCHOONOVER,
HARRY R. ARCHBALD,
Attorneys for Plaintiff.

[Endorsed]: No. 106 and 243, Cons. U. S. District Court, Ninth District, Southern District of California. United States of America, Pl., vs. San Pedro, Los Angeles and Salt Lake R. R. Co., Defendant. Order Staying Proceedings. Filed Apr. 2, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Pennel Cherrington, 502-4 Pacific Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. [130]

*In the United States District Court for the Southern
District of California, Southern Division.*

(Consolidated.)

No. 106—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,
Defendant.

No. 243—Civil.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,
Defendant.

Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, San Pedro, Los Angeles & Salt Lake Rail-
road Company, a corporation, as principal, and
National Surety Company of New York, as surety,
are held and firmly bound unto The United States
of America, the plaintiff above named, in the sum
of Six Thousand Dollars (\$6,000.00), to be paid to
said The United States of America, to which pay-
ment, well and truly to be made, we *bond* ourselves,
jointly and severally, and our and each of our suc-

cessors and assigns, firmly by these presents.

Sealed with our seals, and dated this 2 day of April, A. D. 1914.

WHEREAS, the above-named defendant, San Pedro, Los Angeles & Salt Lake Railroad Company, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled consolidated causes by the United States District Court for the Southern District of California, Southern Division, rendered and entered in said causes on the 8th day of October, 1913.

NOW THEREFORE, the condition of this obligation is such that if the above-named San Pedro, Los Angeles & Salt Lake Railroad [131] Company shall prosecute said writ to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

SAN PEDRO, LOS ANGELES & SALT
LAKE RAILROAD COMPANY,

By H. L. NUTT,
Its General Manager.

NATIONAL SURETY COMPANY OF
NEW YORK.

By CHAS. SEYLER, Jr.,
Its Attorney in Fact.

Affidavit and Acknowledgment by Surety Company.

State of California,
County of Los Angeles,—ss.

On this 2d day of April, A. D. 1914, before me personally came Chas. Seyler, Jr., known to me to be

the Attorney-in-Fact of the National Surety Company, the corporation described in and which executed the within Bond as a Surety thereon, and who, being duly sworn, did depose and say that he signed his name thereto by order and authority of the Board of Directors of said company, and that he affixed its Corporate Seal thereto by like order and authority.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal, the day and year first above written.

[Seal]

HAZEL JONES,

Notary Public in and for Los Angeles County.

Approved:

OLIN WELLBORN,

Judge. [132]

[Endorsed]: Nos. 106 and 243, Civil. U. S. District Court, Ninth District, Southern District of California. The United States of America vs. San Pedro, Los Angeles & Salt Lake Railroad Co., Defendant. Bond. Filed Apr. 3, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Pennel Cherrington, 502-4 Pacific Electric Bldg., Los Angeles, Cal., Solicitor for Defendant. [133]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

CLERK'S OFFICE.

Two Cases—Nos. 106 and 243 Civil, Consolidated.

THE UNITED STATES OF AMERICA

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY.

Praeceptum [for Certified Copy of Record].

To the Clerk of Said Court:

Sir: Please issue a certified copy of the record in the above-entitled consolidated causes, consisting of—

Judgment-roll,

Bill of Exceptions,

Petition for Writ of Error,

Assignment of Errors,

Order Denying Motion for New Trial,

Supersedeas Bond,

Writ of Error,

Order Allowing Writ of Error,

Citation in Error,

—and Defendant's Exhibit; said record to be certified under the hand of the Clerk and the seal of the court.

Dated this 3d day of April, 1914.

PENNEL CHERRINGTON,
Attorney for Defendant.

[Endorsed]: Nos. 106 and 243, Consolidated. U. S. District Court, Southern District of California, Southern Division. The United States of America v. San Pedro, Los Angeles & Salt Lake Railroad [134] Co. Praeceptum for Record. Filed Apr. 4, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [135]

[Certificate of Clerk U. S. District Court to Transcript of Record, etc.]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

(Consolidated.)

No. 106—Civil.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,

Defendant.

No. 243—Civil.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAN PEDRO, LOS ANGELES & SALT LAKE
RAILROAD COMPANY,

Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing one hundred and thirty-five (135) typewritten pages, numbered from 1 to 135 inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Judgment-roll, order Denying Motion for New Trial, Bill of Exceptions, Defendant's Exhibit, Assignment of Errors, Petition for Writ of Error, Order Allowing Writ of Error, Order Staying Proceedings, Supersedeas Bond and Praecipe for Transcript, in the above and therein-entitled causes, and that the same together constitute the record in said consolidated cause, as specified in the said Praecipe filed in my office on behalf of the plaintiff in error by its attorney of record. [136]

I do further certify that the cost of the foregoing record is \$72.50, the amount whereof has been paid me by the San Pedro, Los Angeles & Salt Lake Railroad Company, the plaintiff in error in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 22d day of April, in the year of our Lord one thousand nine hundred and fourteen, and of our Independence the one hundred and thirty-eighth.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California. [137]

[Endorsed]: No. 2412. United States Circuit Court of Appeals for the Ninth Circuit. San Pedro, Los Angeles & Salt Lake Railroad Company, a Corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Received and filed April 23, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2412.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

San Pedro, Los Angeles & Salt
Lake Railroad Company, a cor-
poration,

Plaintiff in Error,

vs.

The United States of America,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

A. S. HALSTED,

JAMES E. KELBY,

Attorneys for Plaintiff in Error.

Filed

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F. D. Monckton,

No. 2412.

**United States
Circuit Court of Appeals**

FOR THE NINTH CIRCUIT.

**San Pedro, Los Angeles & Salt
Lake Railroad Company, a cor-
poration,**

Plaintiff in Error,

vs.

The United States of America,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

I.

For convenience in reference, and in the interest of brevity, the plaintiff in error will hereinafter be referred to as defendant, and the defendant in error as plaintiff.

II.

STATEMENT.

This is a Writ of Error sued out by San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation, the plaintiff in error, defendant below, to

review a judgment rendered against it in the District Court of the United States for the Southern District of California, Southern Division, at the Term A.D. 1913.

III.

ORDER CONSOLIDATING CASES.

Case No. 106 Civil, S. D., was by order of court, based upon the stipulation of the parties, consolidated with Case No. 243 Civil, S. D., and as thus consolidated, the two cases were tried together. [Tr. p. 73, *et seq.*]

IV.

STATEMENT OF NATURE OF CASE.

Each of the cases mentioned, and each of the separate counts or causes of action therein set forth, was and is grounded upon an Act of Congress entitled "An Act to Promote the Safety of Employees and Travelers upon Railroads by Limiting the Hours of Employees therein," approved March 4th, 1907, (34 U. S. Stats. at Large, p. 1415), and commonly known as the "Hours of Service Act."

The complaint in case No. 106 declared upon five separate counts or causes of action, and the complaint in case No. 243 upon twenty-two separate counts or causes of action. The fifth cause of action in case No. 106 was dismissed by request of the plaintiff.

The case was tried before the court, and a jury,

upon an agreed statement of facts, reinforced by the oral testimony of a witness produced by and on behalf of the plaintiff. At the close of the trial the court, on its own motion, peremptorily instructed the jury to find in favor of the plaintiff on each count of the complaint in each case (Nos. 106 and 243), except the fourth count or cause of action in the complaint in case No. 106, upon which they were directed to find in favor of the defendant. A verdict was returned accordingly.

Thereafter, at the said term, the court pronounced judgment that the defendant pay a penalty of one hundred dollars (\$100.00) on each of the following causes of action in case No. 243 (S. D.), namely: Causes of action numbers 1, 2, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22; that the defendant pay a penalty of one hundred fifty dollars (\$150.00) on each of the following causes of action in case No. 243 Civil (S. D.), namely: Causes of action numbers 3, 4, 5, 6, 7 and 8; that the defendant pay a penalty of one hundred fifty dollars (\$150.00) on each of the following causes of action in case No. 106 Civil (S. D.), namely: Causes of action numbers 1, 2 and 3; and that the defendant pay the costs in case No. 106 Civil (S. D.), in case No. 243 Civil (S. D.), and in the consolidated numbers 106 and 243 Civil (S. D.)

Judgment was entered accordingly against the defendant and in favor of the plaintiff, for a total of two thousand nine hundred fifty dollars (\$2,950.00),

together with costs and disbursements taxed at seventy-one dollars and twenty cents (\$71.20).

Thereafter the defendant timely filed its motion for a new trial, which motion was denied. Defendant brings its Writ of Error.

V.

ASSIGNMENTS OF ERROR BY DEFENDANT.

I.

The Trial Court erred in instructing the jury as follows:

“In the two cases, gentlemen of the jury, of the United States of America against San Pedro, Los Angeles & Salt Lake Railroad Company—one of them is numbered 106 and the other 243—which, by reason of their consolidation, have been tried together, the facts are agreed upon. There is no controversy but that in all of these cases mentioned in the complaint—both complaints—the employees named in each count were permitted to remain on service for periods longer than those allowed by the statute. In each case the defendant has sought to justify the detention or the allowing of these employees to remain on service. The facts are agreed upon, and hence it is a matter of law for the Court to determine. And upon these agreed facts I shall hold, and do hold, as matter of law, that none of these defenses to any of these causes of action, except the fourth cause of action in complaint number 106, is good. The Court therefore instructs you—and it

is your duty to obey the instructions of the Court—to find in favor of the plaintiff on each count of the complaint in each case except the fourth count or the fourth cause of action in the complaint in case 106, and on that cause of action you will return a verdict in favor of the defendant. Submit the form of verdict to the jury, and let one of your number be selected as foreman and let him sign the verdict.”

II.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the first cause of action in case 106.

III.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the second cause of action in case 106.

IV.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the third cause of action in case 106.

V.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 1st cause of action in case 243.

VI.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 2nd cause of action in case 243.

VII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 3rd cause of action in case 243.

VIII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 4th cause of action in case 243.

IX.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 5th cause of action in case 243.

X.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 6th cause of action in case 243.

XI.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 7th cause of action in case 243.

XII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 8th cause of action in case 243.

XIII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 9th cause of action in case 243.

XIV.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 10th cause of action in case 243.

XV.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 11th cause of action in case 243.

XVI.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 12th cause of action in case 243.

XVII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 13th cause of action in case 243.

XVIII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 14th cause of action in case 243.

XIX.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 15th cause of action in case 243.

XX.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 16th cause of action in case 243.

XXI.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 17th cause of action in case 243.

XXII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 18th cause of action in case 243.

XXIII.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 19th cause of action in case 243.

XXIV.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 20th cause of action in case 243.

XXV.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 21st cause of action in case 243.

XXVI.

The Court erred in directing the jury to find a verdict in favor of the plaintiff on the 22nd cause of action in case 243.

XXVII.

The Court erred in overruling and denying the defendant's motion for a new trial.

The defendant in due form, and at the proper time,

excepted separately to the court's instructions to the jury directing them to find for the plaintiff on each cause of action (in the two cases) except that part of the instruction which directed a finding for the defendant. [Tr. p. 111, *et seq.*]

VI.

COMPLAINT IN CASE NO. 106.

The complaint in case No. 106 contains five separately stated causes of action. Inasmuch as the fifth cause of action was dismissed by the plaintiff, and there was a finding for the defendant on the fourth cause of action, it will only be necessary for our purposes to consider with what briefness we may, the remaining counts, 1, 2 and 3.

It is alleged in the complaint:

(a) "this action being brought upon the suggestion of the Attorney General of the United States *at the request of the Interstate Commerce Commission, and upon information furnished by said Commission*";

(b) "that said defendant is, and was during all the times mentioned herein, a corporation and a common carrier engaged in interstate commerce by railroad in the State of California".

And, stripped of all its formalities, the complaint proceeds:

FIRST CAUSE OF ACTION.

That in violation of the Act of Congress hereinbefore mentioned, the defendant, during the twenty-four-hour period beginning at 8:00 o'clock a. m. on January 19th, 1911, at its office and station at Kelso, California, required and permitted its telegraph operator, one Grandee, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period, to-wit: from 8:00 o'clock a. m. to 8:00 p. m. on January 19th, 1911—or a total of twelve hours; that Kelso was at that time a continuous night and day telegraph station, and that Grandee while so required and permitted to remain on duty during said period, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

SECOND AND THIRD CAUSES OF ACTION.

Differing only in the name of the operator and the periods of labor, the averments of the second and third causes of action are identical in every respect with those of the first cause of action. The operator named in both the second and third causes of action is one Dugan, of whom, in the second cause of action, it is averred, that he was required and permitted to be on duty as such operator from 8:00 o'clock p. m., January 19th, 1911, to the same hour A. M. on January 20th, 1911,—or precisely twelve hours; and in the third cause of action, that Dugan was required and

permitted to be on duty as such operator from 8:00 o'clock p. m. on January 20th, to the same hour a. m. on January 21st, 1911,—or precisely twelve hours.

Thus, all three counts refer to one station—Kelso—a telegraph office and station at the time continuously operated night and day—a “three-trick office”, and to a continuous period of time commencing at 8:00 o'clock a. m. on January 19, 1911, and ending at the same hour A. M. on January 21, 1911,—an unbroken continuous period of forty-eight hours, of which Grandee was required and permitted to remain on duty for a continuous period of twelve hours, being the first quarter of the greater period; Dugan for a continuous period of twelve hours, being the second quarter of the greater period, and Dugan for a continuous period of twelve hours, being the last quarter of the greater period; that each, Grandee and Dugan, while so on duty, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

AMENDED ANSWER IN CASE NO. 106.

The amended answer and justification to the first cause of action, reaverred as to the second and third causes of action, is, epitomized :

That at the time alleged, the force of telegraphers employed at Kelso consisted of an agent operator, whose hours were from 8 o'clock a. m. to 4 o'clock p. m., and two telegraph operators, whose hours were

from 4 o'clock p. m. to 12 o'clock midnight, and from 12 o'clock midnight to 8 o'clock a. m. respectively; that on January 16th, 1911, one Starkey, one of the regular telegraph operators at Kelso, whose hours were from 4 o'clock p. m. to 12 o'clock midnight, was taken suddenly ill and became incapacitated for service; that Kelso is a helper terminal and important telegraph station continuously operated day and night; that at the time said Starkey was taken ill, there was no available operator at Kelso to replace him, and it was necessary to procure another operator and send him to Kelso, *and that as soon as possible the defendant did procure an operator, V. G. Ham, and send him to Kelso for service to take the place of said Starkey*, and said Ham began his service as soon as possible, to wit, January 20th, 1911; that by reason of the facts aforesaid an emergency arose and existed which required and made it necessary and imperative to require said Grandee (first cause of action) and Dugan (second and third causes of action) to work overtime as alleged in the complaint.

Re-stated, the defense to each of the three counts mentioned, is:

(1) That Starkey, one of the regular telegraph operators at Kelso, whose "trick" was from 4 o'clock p. m. to midnight of each twenty-four hour period, became suddenly ill and unfit for duty on the 16th day of January, 1911;

(2) That at that time and place there was no available operator to take his place;

(3) That it was necessary to procure another operator and send him thither;

(4) That as soon as possible another operator, one Ham, was procured and sent to Kelso;

(5) That Ham began his service at Kelso as soon as possible, towit, January 20th, 1911;

(6) That by reason of the premises an emergency existed which justified the excessive hours mentioned in the complaint.

VII.

ARGUMENT IN CASE NO. 106.

Defendant contends that the trial court erred, as related to case No. 106, in giving the instruction embodied in Defendant's Assignments of Error, peremptorily directing a finding for the plaintiff on the first, second and third causes of action respectively, for the reason that the amended answer of the defendant tendered, and the proof established, a good, sufficient and complete defense and justification to the several infractions set up in said causes of action respectively.

The soundness of this claim is, of course, to be determined by the amended answer, the proof, and the provisos respectively to sections 2 and 3 of the Hours of Service Act.

The complaint (first count) charges a violation of the Act as by requiring and permitting Grandee to work 12 hours in the twenty-four hour period beginning at 8:00 o'clock a. m. of January 20th, 1911.

The defense, already stated, is: (1), that Kelso was a continuous night and day telegraph station; (2), that three operators were regularly employed thereat whose hours of service were, (first "trick"), from 8:00 o'clock a. m. to 4:00 o'clock p. m.; (second "trick"), from 4:00 o'clock p. m. to 12:00 o'clock midnight, and, (third "trick"), from 12:00 o'clock midnight, to 8:00 o'clock a. m., respectively, in each period of twenty-four hours; (3), that on January 16th, 1911, one of the operators, (Starkey), who performed the second "trick," became suddenly ill and incapacitated for service; (4), that at that time there was no available operator at Kelso to take the place of Starkey, and it was necessary for defendant to procure another operator and send him to said station; (5), that as soon as possible defendant did procure an operator, one Ham, and did send him to Kelso to replace Starkey, and did so replace him as soon as possible, to wit: January 20th; (6), that an emergency existed which justified the overtime of Grandee as alleged in the complaint.

The complaint, (second count), charges a violation of the Act as by requiring and permitting Dugan to work twelve hours in the twenty-four hour period beginning at the hour of 8:00 o'clock p. m. of January 19th, 1911; and the defense pleaded thereto is the same as to the first count.

The complaint, (third count), alleged a violation of the Act as by requiring and permitting Dugan to work twelve hours in the twenty-four hour period beginning at the hour of 8:00 o'clock p. m. of Jan-

uary 20th; and the defense pleaded is the same as to the first count.

The testimony is: [Tr., p. 103, *et seq.*] That Kelso is 236 miles east of Los Angeles, and is situated in the desert between Crucero and Las Vegas; that it was, throughout January, 1911, a continuous night and day office; that Grandee and Dugan were employed as operators there, Grandee also performing the duties of agent, and both handling train orders affecting the movement of interstate trains; that Grandee's hours on January 19th, were from 8:00 o'clock a. m. to 8:00 o'clock p. m.—twelve hours; that Dugan on January 19th, 20th and 21st, was on duty from 8:00 o'clock p. m. to 8:00 o'clock a. m.—continuously twelve hours—; that he quit at 8:00 o'clock a. m. of the 20th, and went to work again at 8:00 o'clock p. m. of that day and worked until 8:00 a. m. of January 21st; that Grandee and Dugan were kept on overtime because operator Starkey became ill on the 16th; that at that time the Kelso office was under the supervision of the Chief Dispatcher at Las Vegas; that when Starkey was taken ill and the Chief Dispatcher was apprised of the fact, the latter, on the morning of January 17th, wired to the Superintendent of Telegraph at Los Angeles, he being the officer who employed operators, for a relief operator, but who did not secure an operator to take Starkey's place; that on the evening of the 17th, the Dispatcher at Las Vegas borrowed an operator in the Las Vegas telegraph office, and started him to Kelso that night on the first train after it was learned

that a man could not be had in Los Angeles; that when this train reached Lyons, a point between Kelso and Las Vegas, it was derailed and turned over, damaging the equipment, blocking the main line, and injuring fourteen passengers; that the operator (substitute for Starkey), who was on this train was directed by the Chief Dispatcher to establish a telegraph office at the wreck in order to communicate with headquarters and report conditions and progress there, and thereby enable the Dispatcher to move trains around the wreck when the line was cleared—a practice followed on all occasions, as it enables the clearing of the line much more quickly; that said operator established an office at the wreck, where he remained until relieved on the evening of the 19th by a man sent out on train No. 1 to the wreck; that the operator (substitute for Starkey) who had been working at the wreck boarded the same train on which the relief operator had arrived and went to Kelso; *that in view of the shortage of help existing at that time, the substitute operator was sent to Kelso as expeditiously as possible to take Starkey's place*; that at that time telegraph operators were scarce. The Western Union and Postal Companies were using a great many operators, and the men preferred to work in Los Angeles rather than go to desert points, such as Kelso and Otis. At that time there was difficulty in getting operators to go there. On January 16th, (Monday), on the 17th, (Tuesday), on the 18th, (Wednesday), and on the 19th, (Thursday), Grandee was required

to work twelve hours each. Dugan was required to work from 8:00 o'clock p. m. of the 16th, to 8:00 o'clock a. m. of the 17th; also that length of time on Monday; he was also required to work between the same hours from the 17th to the 18th, and again from the 18th to the 19th—so that he worked on Monday, Tuesday, Wednesday, Thursday and Friday twelve hours each. On the entire line from Salt Lake City to Los Angeles, there were at the time 71 telegraph offices, and 106 operators. Many of these were three-men offices, continuously operated day and night, and others were two-men offices. At the time no standing list of reserve operators was kept to relieve regular operators. If a man got sick and quit work, we had to trust to find some one to fill his place, or depend upon employing one for that purpose.

The foregoing is all the testimony adduced relating to Case No. 106.

It may be conceded, therefore, that the overtime, in manner and form as alleged in the complaint, was suffered, and the question is, was it justified as matter of law?

The defendant claims:

First: The illness and consequent disability of Starkey for duty on January 16th, and defendant's inability at that time to replace him with another operator, constituted a "case of emergency" within the meaning and purview of the first proviso to Section 2 of the Hours of Service Act, during which,

subject to the limitation to said proviso, the overtime complained of was lawful.

Second: That the wreck of the train on January 17th, at Lyons, on which the substitute operator was hastening to Kelso, was a casualty, or unavoidable accident, or a delay the result of a cause not known to the carrier, or its officer or agent in charge of the substitute operator at the time he left Las Vegas, *and which could not have been foreseen*, within the scope and meaning of the first proviso to Section 3 of the Act, and justified the overtime complained of.

The first proviso to Section 2, reads:

“Provided, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the day time, except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week.”

The first proviso to Section 3, reads:

“Provided, That the provisions of this Act shall not apply in any case of casualty or unavoidable ac-

cident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen.”

As to the first point: The Government itself appears to have recognized an *emergency* resulting from Starkey's illness, since with full knowledge of the facts it has elected to sue only upon alleged violations occurring after the expiration of the time limited by the proviso to Section 2; in other words, treated as lawful the overtime of Grandee and Dugan on the 16th, 17th and 18th, and as unlawful the overtime performed subsequently, towit: on the 19th, 20th and 21st.

The uncontradicted testimony is that Starkey's illness and disability were, on the afternoon of January 16th, reported to the Chief Dispatcher at Las Vegas, the officer having jurisdiction in the premises, who, in turn, on the morning of the 17th, wired the Superintendent of Telegraph at Los Angeles, the officer concerned with the employment of operators, to furnish and send a substitute, and that not being able so to do, the Chief Dispatcher sent an operator from Las Vegas by the first train leaving that point on the evening of the 17th, *and who, but for the wreck referred to, would have reached Kelso* (distant from Los Angeles, according to defendant's official time card, 198.7 miles) *within five hours substantially thereafter, and in time to begin, after the statutory rest, Starkey's trick, which began at 4:00 o'clock*

p. m. on the 18th, and in time to render unnecessary the excessive hours worked by Grandee and Dugan on the 18th, 19th, 20th and 21st,—being the excessive hours complained of in the first, second and third causes of action in case No. 106.

It is also the undisputed testimony that there was no available operator at Kelso who could have been substituted for Starkey.

It is also the uncontradicted testimony, and must be accepted as true, that it was impossible to find an operator at Los Angeles for that purpose.

It is also the uncontradicted testimony, and must be accepted as true, that a substitute was sent to Kelso as expeditiously as possible.

It is also the uncontradicted testimony, and must be accepted as true, that but for the wreck referred to, the substitute would have reached Kelso by or before the third day of the emergency period.

It is also the uncontradicted testimony, and must be accepted as true, that on the 17th, the train bearing the substitute operator to Kelso, was derailed and turned over at Lyons, a point between Las Vegas and Crucero, its equipment damaged and fourteen passengers injured.

It is also the uncontradicted testimony, and must be accepted as true, that the substitute operator, unable to press forward on his mission by reason of said wreck, was directed to, and did, establish and maintain a telegraph office at the scene of the wreck.

It is also the uncontradicted testimony, and must be accepted as true, that the substitute operator

proceeded to and arrived at Kelso by the same train which brought the relief operator to Lyons.

Therefore it is, that the efficient and operative, nay, the direct, cause of the excessive hours of service complained of, and which the trial court held were severally violations of the Act, were the result of the wreck in question, which was *a case of casualty, or unavoidable accident*, and of delay the result of a cause not known to defendant or its officer or agent in charge of the substitute operator at the time said operator left the terminal,—Las Vegas; and which affected alike the substitute operator and the diminished staff at Kelso.

If, as stated, the excessive hours complained of were directly due to a casualty or unavoidable accident, or flowed from a delay the result of a cause etc., then by force of the provisions of the proviso to the third section of the Act, the Act itself, in its entirety, including the proviso to section 2, was tolled, and became non-operative until the arrival of the substitute operator at Kelso by the first train from the scene of the wreck.

The same question is presented here that was presented and decided by the United States Circuit Court of Appeals for the Eighth Circuit, in the case of *United States of America v. Missouri Pacific Ry. Co.*, reported in Vol. 213 Fed. Rep., at page 169, in which that Court held that the provisions of the proviso to section 2 of the Act, which relate to telegraph operators and train dispatchers, are subordinate to and governed by the proviso to the third

section, which declares that the Act *shall not apply in case of casualty, etc.*; and we commend the reasoning of that case to this Court as determinative of the question involved in the immediate inquiry.

While the casualty in question is not set up in defendant's answer, defendant, nevertheless, under the stipulation of facts [Tr. p. 82], was permitted to make any affirmative defense under the plea filed by it in this case without the necessity of filing an amended answer; and accordingly that defense is open.

Starkey's illness, we contend, constituted an emergency cognizable by the proviso to section 2, and the wreck at Lyons, a casualty or unavoidable accident, or delay within the purview of the proviso to section 3, of the Act. The former was an emergency which authorized both Grandee and Dugan to work thirteen hours during each of three days in the calendar week beginning on Sunday the 15th; and the defendant having employed the greatest diligence in the initial stage of that emergency to provide a substitute for Starkey, and was only prevented from doing so by a case of casualty, or unavoidable accident, or delay which could not have been foreseen when the substitute left the terminal, Las Vegas, on the 17th, the second day of the original emergency—the defendant is not guilty of an offense. While the first emergency existed it became merged into an extraordinary emergency which removed entirely the application of the Act. The excess hours of service performed by each Grandee

and Dugan on the 17th, 18th and 19th, were those performed during the emergency flowing from Starkey's illness, and were lawfully performed, while those performed after that period were those performed in consequence of a casualty, etc., in respect to which the defendant was not in default. Nor was it in default in making the arrangement to furnish a substitute for Starkey.

We therefore, submit that the justification pleaded and proved by defendant forbade a recovery, and that the instruction given by the court to find for the plaintiff on each the first, second and third causes of action in case No. 106, was erroneous, and that the judgment should be reversed as to these causes of action.

CASE NO. 243.

I.

STATEMENT OF NATURE OF CASE.

The complaint in this case declares upon twenty-two separate counts or causes of action, each for the violation of the "Hours of Service Act," *supra*; but it will only be necessary to here refer to counts three, four, five, six, seven and eight, covered by defendant's assignments of error numbered respectively, VII, VIII, IX, X, XI, XII.

As in case No. 106, the complaint contains the declaration—"this action being brought upon the suggestion of the Attorney General of the United

States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.”

This case was tried upon the pleadings, the agreed statement of facts and the oral testimony, all of which are embodied in and form a part of defendant's Bill of Exceptions.

Under the instruction of the court, embodied in defendant's Assignments of Error, the jury was directed to, and did, find in favor of the plaintiff on each of the twenty-two causes of action in this case.

II.

DEFENDANT'S ASSIGNMENTS OF ERROR.

The defendant's assignments of error are those hereinbefore set out in connection with case No. 106, and need not be repeated.

III.

THE COMPLAINT IN CASE NO. 243.

The third count of the complaint alleges a violation of the Act *supra*, in that the defendant, on October 3rd, 1912, on its line between Las Vegas, Nevada, and Los Angeles, California, required and permitted its conductor, Brown, to be and remain on duty as such, in connection with its train No. 1, drawn by locomotive No. 3434, engaged in interstate commerce, for a period in excess of sixteen consecutive hours.

The fourth and fifth counts are identical with the third, save that in the fourth count brakeman, Edwards, and in the fifth count, brakeman, Berringer, are involved.

The answer to each of these three counts is the usual traverse. It must not be forgotten, however, that under the terms of the stipulation embodied in the Bill of Exceptions herein, the defendant was permitted to make any affirmative defense under its plea without the necessity of reforming its answer. The fact, therefore, that it tendered no special defense by way of plea will not operate to deprive it of its special defense, if any it has succeeded in affirmatively establishing conformably to the stipulation.

The only evidence adduced touching the counts under inquiry, was the testimony of C. P. Smith, Chief Clerk of the Superintendent of defendant. Smith testified, in substance, [Tr. p. 91, *et seq.*]: Train No. 1, covered by the third, fourth and fifth causes of action in case No. 243, left Las Vegas, Nevada, October 3rd, 1912. It came from Salt Lake City, but on this Division it started at Las Vegas with its crew. It was a passenger train and its destination was Los Angeles. Its conductor was Brown, and its brakemen Edwards and Henderson. On the day mentioned, they reported for duty at 5:00 o'clock p. m., the train leaving at 5:42 o'clock p. m., the 42 minute period was devoted to preparatory work. They brought the train through to Los Angeles, having been connected with its movement

during the entire trip. They reached Los Angeles at 8:00 o'clock p. m., October 4th, when they were relieved after having been in continuous service for 27 hours.

Also: The train was not operated over defendant's line for the entire distance. Normally the train would have gone from Las Vegas to Daggett over defendant's line, from Daggett to Colton over the line of the Santa Fe; from Colton to Riverside Junction over the line of the Southern Pacific, and thence over defendant's line to Los Angeles. Defendant has joint track contracts with both the Santa Fe and Southern Pacific Companies. The train in question came over defendant's tracks from Las Vegas to Crucero, California. On account of a land slide it was detoured over the line of the Tonopah & Tidewater Railroad Company from Crucero to Ludlow, thence over the Santa Fe to Daggett, and from the last named point via the usual route.

Also: Las Vegas is 334 miles from Los Angeles. From Las Vegas to Crucero it is 129.9 miles; Crucero to Daggett 41.1 miles, and from Daggett to Los Angeles 158.6 miles. In detouring that day, the train went approximately 28 extra miles. It is a little over 25 miles from Crucero to Ludlow, and 44.2 miles from the last named point to Daggett. The train ran on schedule from Las Vegas to Crucero, and then to Daggett probably as an extra, as it was not regularly scheduled over the Tonopah & Tidewater road, or over that of the Santa Fe between the points heretofore mentioned. From Dag-

gett to Los Angeles it was Train No. 1. The employees named were under the control of the defendant from Las Vegas to Crucero and again after leaving Riverside Junction.

Also: The first division point west of Las Vegas is Otis, 4 miles east of Daggett. It is a freight and not a passenger terminal, although freight crews at that point were qualified as passenger crews. The train was delayed ten minutes at Daggett while a fresh engine crew was sent down from Otis to relieve the engine crew, but no conductor or brakemen were sent, and no effort was made to send them. We had no freight crews available at Otis when the train passed Daggett. No effort was made at San Bernardino to relieve the conductor and brakemen. San Bernardino, for overland passenger trains, is not a terminal, although it is a freight terminal. It is also a passenger terminal for local crews running between San Bernardino and Los Angeles. Those trains go to San Bernardino over the line of the Southern Pacific after leaving Riverside Junction. No effort was made at San Bernardino to relieve the crew of No. 1, though it could have been done by sending a crew from Los Angeles. The crew could have been relieved at any point by sending out a crew from Los Angeles, "provided defendant had the means to get them there."

Also: The train reached Crucero at 11:55 o'clock p. m. of October 3rd; Ludlow at 6:15 o'clock a. m. of the 4th; left Ludlow at 9:45 o'clock a. m. and reached Daggett at 11:45 o'clock a. m., reaching San

Bernardino at 4:35 o'clock p. m. on the 4th. Crucero, Ludlow and Daggett were telegraph stations handling train orders, and were open when No. 1 passed there. The train was under the direction of the Chief Dispatcher at Los Angeles, but he could not know when the train arrived at or departed from Ludlow because of wire trouble caused by weather conditions. He did know when the train passed Daggett, and that when it reached there it would be impossible for it to reach Los Angeles within the sixteen hour limit from the time it left Daggett. Despite that knowledge, no effort was made to send a relief crew to San Bernardino from either Los Angeles or Otis.

Also: The carded time of No. 1 for October 3rd and 4th, between Las Vegas and Los Angeles was 13 hours and 30 minutes. When No. 1 left Las Vegas on the night of October 3rd, it was not known that it would have to detour at Crucero. There was a delay of 1 hour and 30 minutes between Las Vegas and Crucero picking up section and bridge men to repair a land slide which had occurred between Crucero and Otis—to help clear the line for traffic. When the train left Las Vegas it was not known that it would have to pick up these men—not known until Jean, a distance of 40 miles from Las Vegas, was reached. The land slide was on the main line between Crucero and Otis. Otis was a freight terminal where freight crews are relieved. There is a difference between a passenger train crew terminal and an engine crew terminal; the former consists of a conductor and

two brakemen, the latter of an engineer and fireman. San Bernardino was not a passenger train crew terminal for through service.

Also: When train No. 1 reached Daggett, where it changed its engine crew instead of at Otis, as was usual, there were no freight crews available at Otis. They had been put in work train service, and had gone to the land slide to help clear the line. When this train reached San Bernardino, there were no freight crews there; they had been sent out in freight service prior to the arrival of this train. San Bernardino was not a passenger train crew terminal for through trains, but there were two local passenger train crews which laid over there each night; they had only one brakeman each. The through trains ran from San Bernardino to Colton over the line of the Santa Fe, but the two local crews running from San Bernardino to Riverside Junction ran over the Southern Pacific line—a different system and different roadbed from the Santa Fe. These local crews laying over at San Bernardino may have been familiar with Santa Fe rules, but so far as I know they never operated trains over that road.

Also: Train No. 1 was delayed at Crucero 55 minutes waiting for orders and pending completion of arrangements to detour over the Tonopah & Tidewater road. This delay was not known when the train left Las Vegas. It was next delayed 2 hours and 10 minutes at Crucero by reason of a bridge being washed out on the line of the Tonopah & Tidewater, and having to return to Crucero until the

same was repaired. This washout was not known when the train left Las Vegas, nor when it left Crucero. There was a further delay of 1 hour and 35 minutes between Crucero and Ludlow on account of slow orders due to light rails with which the Tonopah & Tidewater was laid, and soft track as the result of rains. We knew when we left Las Vegas that the Tonopah & Tidewater was laid with light rails, but not of the other causes. We were always held down to 15 miles an hour when detouring over that line, and we knew—that when we left Las Vegas—that was the regular thing on account of the weight of our engines. When we left Las Vegas we did not know we had to detour. Before this we had frequently detoured by way of Crucero and Ludlow. Ordinarily trains so detoured got to Los Angeles within the 16 hour period, barring unusual conditions such as obtained in this case.

Also: After No. 1 left Crucero, there was a delay between that point and Ludlow of 1 hour and 35 minutes. That did not include the 15 hour running time, and shorter running time in some places because of weakened track. When I spoke of slow orders, I meant at points at which they held the train down in some places as slow as four miles an hour by reason of the conditions which obtained. The Tonopah & Tidewater line had had heavy rains, the same as occurred on defendant's line. We did not know of or suspect these delays when No. 1 left Las Vegas. *After leaving Las Vegas, heavy rains in the hills, severe electrical storms, and storm water run-*

ning strongly in waterways developed which were unknown and unforeseen when we left Las Vegas.

Also: No. 1 was delayed at Ludlow 3 hours and 20 minutes because the main line of the Santa Fe was blocked by the derailment of a Santa Fe train. Train No. 1 got to Daggett at 11:45 o'clock a. m.—17 hours and 5 minutes after leaving Las Vegas—and hence beyond the 16 hour period. I have no record of any delay between Daggett and Los Angeles. *None of the delays testified to could have been foreseen when the train left Las Vegas.*

Also: None of the local crews at San Bernardino would have been sufficient to run a through train, and it would have been necessary to take a portion of both crews, to have done which would have tied up one or both of the local passenger trains until relief crews could have been sent from Los Angeles; would have required one local crew and a half to man one through train, which would have laid out both of the local trains, each of which carried mail.

Also: Before No. 1 left Las Vegas, it was known there had been heavy rains in the canyon between Otis and Crucero, but the extent of the damage was not known. It was at Jean that that train got orders to pick up section men. It was known there had been considerable damage in the canyon.

Also: So far as I know, the only place at which relief crews at that time were obtainable, was Los Angeles. We had regularly assigned crews at each terminal, and kept men for emergencies at Las Vegas

and Los Angeles, but not at San Bernardino and Otis.

Also: The defendant has had a number of land slides, but none of which tied up the road previous to this time; never before had there been a serious one. *The seriousness of this one could not have been known or appreciated when train No. 1 left Las Vegas.* The bridge encountered on the Tonopah & Tidewater, is situated about a quarter of a mile from Crucero, where the train went back until the bridge was repaired and waited there and did not go back after the bridge was repaired. Crucero was not a terminal of any kind, but simply a crossing of two railroads.

Also: Train No. 1 left Crucero at 3:00 o'clock a. m. on the 4th, and its running time, when not detoured from that point, to Los Angeles was 8 hours and 35 minutes. When detouring a train we run it part of the way over the line of some other road, and so running, you can never tell what delays will be encountered, because while it is on the foreign line, it is under the jurisdiction of its dispatchers. As matter of fact, Train No. 1 while being detoured, was laid out to give trains of the other line precedence. After train No. 1 left Crucero, and until it reached Colton, the dispatchers of defendant had no jurisdiction over it—that is, while on the Tonopah & Tidewater, it was under the jurisdiction of the dispatchers of that line, and after leaving Ludlow, and from thence to Colton, it was under the jurisdiction of the dispatchers of the

Santa Fe. At Daggett the dispatchers handle trains of both the Santa Fe and of defendant jointly. Defendant had no joint dispatchers on the Tono-
pah & Tidewater, nor on the Santa Fe between Ludlow and Daggett, but from Daggett to Los Angeles a different condition prevailed, there it was a joint track. Train No. 1 carried United States mail. *Las Vegas, from which No. 1 started on October 3rd, was a terminal, and the next terminal for that train was Los Angeles, and the crew of that train ran regularly from Las Vegas to Los Angeles, and vice versa.*

The foregoing is, in substance, the entire testimony in respect to the questions involved in the immediate inquiry. Shorn of its terminology and reduced to its simplest terms, the testimony speaks thus:

Defendant's passenger train No. 1, running between Salt Lake City, Utah, and Los Angeles, California, arrived at Las Vegas, Nevada, on October 3rd, 1912, between the hours of 5:00 o'clock and 5:32 o'clock p. m. Las Vegas was a terminal station on defendant's line. There the entire crew was changed, the outgoing train crew consisting of a conductor, (Brown) and two brakemen (Edwards and Henderson), which crew remained, and were solely concerned with and directed the movement of that train from the time it left Las Vegas at 5:45 o'clock p. m. on October 3rd, until it reached the next and final terminal—*the end of its run*—Los Angeles, at 8:00

o'clock p. m. on the succeeding day—October 4th. Including the preparatory time of 42 minutes, the crew in question had been in service 27 continuous hours in connection with that train.

Los Angeles was distant from Las Vegas 334 miles, and the train in question, as its number implies, was proceeding from Las Vegas, east, to Los Angeles, west. The schedule running time of that train between the points named was 13 hours and a half. After the train left Las Vegas (on schedule) a heavy land slide occurred on defendant's line west of Las Vegas, and between the stations of Otis and Crucero, due to heavy rains in the hills, severe electrical storms, and storm water running strongly in waterways. The land slide in question was of such character and magnitude as to put defendant's line out of commission and compel it to detour train No. 1 via the lines respectively of the Tonopah & Tidewater and the Santa Fe Companies; over that of the former from Crucero, the junction of the lines of defendant and the Tonopah & Tidewater Company, to Ludlow, the junction of the last named Company and the Santa Fe Company, and over the latter from Ludlow to Daggett. Numerous necessary and unavoidable delays were encountered in connection with the detourage over the foreign lines, as the testimony amply illustrates, but with none of which was the defendant in relation, and each of which was beyond its power to prevent; and none of which nor the necessity of detour could have been foreseen when the train left Las Vegas.

While it is true, according to the testimony, that the defendant had information that there had been rains in the canyon between Otis and Crucero, the extent of the damage occasioned thereby was not known. Indeed, the true situation did not develop until the arrival of the train at Jean, a point about forty miles west of Las Vegas, where orders were received to pick up section and bridge men to repair the slide and clear the line, and in performing which, a delay of 90 minutes was necessarily incurred. And neither the fact of the land slide, nor that a delay would be encountered at Jean, was known or foreseen, or could have been known or foreseen, when the train left Las Vegas. At Jean it was known for the first time that there was serious damage in the canyon which disabled the line.

We may be pardoned for suggesting that from the scope and wide range of the examination of the witness Smith, whose testimony we have quoted, it is evident that counsel for the Government, in their zeal to secure a conviction, went to the farthest point to wring admissions from the witness to bolster up some novel theory formed by them to overturn the adjudication with which they were confronted, and which rules this case. That this is true, we shall hereafter attempt to show. That which leads us to make the observation is this:

If the excessive hours worked by the train crew did not directly spring from, or were not in relation with one or more of the exceptions enumerated in the first proviso to section 3 of the Act, then, as mat-

ter of law, the defendant was guilty as charged in each of the three counts. If one or all of the exceptions existed, the excess hours were lawful, for the proviso provides that the "Act does not apply in any case of casualty or unavoidable accident; nor where the delay was the result of a cause not known to the carrier or its officers or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen."

Manifestly then, the examination should have been restricted to show the existence or non-existence of one or all of the happenings or causes, which, by force of the proviso, rendered the Act inapplicable and the carrier immune from prosecution thereunder. Whether, after one or more of the exceptions had set in, the carrier could have relieved the crew at one point or another, is beside the question if it was not bound to do so. Therefore, it is, that so much of the examination of the witness as related to the possibility of changing crews at some time or place during the journey, while commendatory of the zeal of counsel, was, we think, foreign to the issue presented.

The proposition here is one of fact and of law. It is in brief: Were the excessive hours performed by the conductor covered by the first count, and by the brakemen covered by the second and third counts, performed in consequence of a case of casualty or unavoidable accident, or the Act of God, or due to a delay which was the result of a cause

and which could not have been foreseen? That is the proposition and question.

It is confidently submitted that the defendant has squarely brought itself within, and is entitled to the benefits of, the exceptions, or one or more of them, declared in the third section of the Act. The evidence shows conclusively that the defendant was guilty of no fault or default or neglect which was in any wise in relation to a cause or causes, circumstance or circumstances which operated to delay the train or compel the excess hours of service complained of. On the other hand, the testimony, we venture to state, shows that the defendant exerted the highest degree of diligence and foresight that was compatible with the object aimed at and the practical operation of its road.

Just why the Court felt itself constrained to instruct for the plaintiff on these counts, we are unable to understand. In his process of reasoning he must have found the defendant guilty of some neglect that was co-operative with or itself the cause of the land slide or the resultant delay; or it may be the Court reached the conclusion that notwithstanding a justifiable delay existed, nevertheless the defendant violated the law in that it failed to relieve the crew at a terminal reached some time before or after the expiration of the 16 hour period. Upon what reasoning the Court arrived at the conclusion indicated by the instruction we are not advised, no opinion, written or oral, having been rendered.

But whatever the process of reasoning employed

by the Court or the conclusions necessarily compelled thereby, it is for us, upon the record here, to the best of our ability, to justify, if we can, the alleged infractions involved in these counts.

First: We assert that the land slide which operated to put the line of defendant out of commission, and to prevent Train No. 1 passing over it, was *a case of casualty or unavoidable accident or an Act of God*, which did not proceed or result from neglect or default of defendant, but from causes wholly beyond its power to prevent, towit: heavy rains in the hills, electrical storms and storm water running strongly in waterways, which developed after, and which were unknown, and which could not have been foreseen when the train left Las Vegas. Upon these points the testimony is positive, decisive and conclusive.

Second: There was a delay—a multiplicity of delays—after the train left a terminal—Las Vegas—the result of a cause not known to defendant or its officers or agents in charge of the train crew at the time that crew left the terminal, and which could not have been foreseen.

The testimony, positive, unimpeached and uncontradicted on these points, is:

“None of the delays I have testified to could have been foreseen when either No. 1 or No. 7 left Las Vegas.” [Tr. p. 99.]

Therefore, on the ground last mentioned, if not

on that first mentioned, the verdict should have been for the defendant.

Stated otherwise, the pleadings and proof show:

(a) There was a delay after leaving *a* terminal which was the result of a cause not known when the crew left that terminal, and

(b) Which—the cause or the delay, or both—*could not have been foreseen.*

Therefore, the defendant completely justified the excessive service under these counts. To say it did not is to deprive words—the testimony—of their meaning and efficacy.

Recurring to the first point: The proviso to the third section of the Act provides:

That the provisions of this act shall not apply:
in any case of casualty
or unavoidable accident
or the Act of God. . . .

It therefore contains four elements, any one of which when it exists, tolls the act, viz: (1), casualty; (2), unavoidable accident; (3), Act of God, and (4), unforeseen delays after leaving a terminal. The first three elements as they occur in the proviso are only separated by the disjunctive “or,” except 3 and 4, which are separated by a semi-colon. Was it the intention of Congress in employing these terms, that the existence of any one of the four elements enumerated should toll the Act? We have been unable to find that this exact question has ever received exposition by the courts.

The term “accident” in the proviso is qualified by the adjective “unavoidable.” The words “Act of God” imply an unavoidable happening, without human intervention. The term “casualty” is neither restricted nor qualified. “Casualty,” like its synonyms, “accident” and “misfortune,” *may proceed or result from negligence or other cause*, “known or unknown.” (Words & Phrases Judicially Defined, Vol. 2, p. 1003.)

There is no apparent ambiguity in the proviso, nor anything therein demanding construction, unless it be claimed that the terms “unavoidable accident” control or qualify the antecedent term “casualty.” Will it be claimed that Congress intended to use the words “casualty,” “unavoidable accident” and “Act of God” interchangeably? If yes, the effect is necessarily to expunge the word “casualty,” since a casualty may sometimes be avoidable. An “accident” is a “casualty,” but there are avoidable as well as unavoidable accidents. If it was intended to qualify the word “casualty” by the succeeding terms “unavoidable accident,” there was no need for the former, since it was necessarily embraced in the latter, and to expunge it in the one case and qualify it in the other, is to ignore the cardinal rule employed in the construction of statutes, which gives effect, if possible, to every word, phrase, etc. If it is a question of expansion or diminution, why not eliminate the word “unavoidable” as qualifying “accident?” That may be done with the same reason. Congress, it may be conclusively presumed,

intended by the use of the term "casualty" without restriction, to embrace all casualties, those avoidable as well as unavoidable, and there is just as much reason for this construction as there is for the other.

In the early part of this argument we took occasion to quote from the complaint the declaration prefacing the first cause of action in each complaint, namely: that the action is brought by the Attorney General of the United States *at the request and upon information furnished by the Interstate Commerce Commission*. The situation presented here, so far as it relates to causes of action 3 to 8 involved in case No. 243, is an anomalous and cheerless one for this defendant in particular, and carriers subject to the Act in general. By section 4 of the Act it is made the duty of the Interstate Commerce Commission to enforce the provisions of the Act, and all powers granted to it are extended to it in the execution of that Act.

The Commission, on June 25th, 1908, about 16 months after the approval of the Act, construing the provisions of the first proviso of section 3 thereof, promulgated the following rule in respect thereto:

"Any employee so delayed may thereafter continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip."

That rule has never been expunged, revised, recalled or modified, and is still in effect so far as it may be effective, binding alike, so far as it goes, both

the commission and the carrier. [Rule 88, Tr. 120, *et seq.*]

The prosecuting witness in this case, the entity furnishing the information upon which the action is brought, is here in derogation of its own rule, a rule with which the carrier can have no quarrel; a rule that has been a guide to its feet and a lamp to its path for more than six years. The Commission has the right to change its mind upon being persuaded that its former ruling was incorrect, but it seems to us that until that rule is changed and notice thereof communicated to the carriers affected, the attitude of the Commission in this case is ill advised and operates to impair the maintenance of that discipline on the part of the carriers, at all times essential to the enforcement of the Act in question.

“*The end of that run*” was Los Angeles; its beginning Las Vegas. The schedule time of No. 1 on October 3rd, 1912, between the points named, was thirteen and one-half hours. When No. 1 left Las Vegas, the line was clear. When it reached Jean, 40 miles west of Las Vegas, it encountered delay or causes of delay hitherto unforeseen and unforeseeable; again upon reaching Crucero; again between Crucero and Ludlow on the line of the Tonopah & Tidewater, and again between Ludlow and Daggett on the line of the Santa Fe. Every moment of that memorable journey, as the train in question slowly made its way against adverse fate and conditions, the defendant, its officers and agents relied upon and

found security in the rule of the Commission which permitted its crew lawfully to continue on duty "*to the end of that run.*"

It seems to us that a decent regard for its own rule should have induced, nay, compelled, the Commission's concurrence in the defendant's course in this case. If the rule was wrong, the Commission had the right and power to change it, and thus put it in the way of the carriers to protect themselves against future exigencies of the same kind. The Commission, by force of every rule is, and very properly should be, estopped to question any act of the defendant performed in strict conformity to its rule.

But the interpretation upon which the rule is based, and the rule itself, are sound; and no other interpretation is possible. The declaration of the statute is, "nor where the delay was the result of a cause not known . . . at the time said employee left a terminal, and which could not have been foreseen." Manifestly, any delay contemplated by the proviso resulting in excess hours performed by an employee after leaving a terminal, be they one or one hundred, removed the application of the Act, and by parity of reasoning, made that lawful which otherwise was unlawful. The proviso does not in terms prescribe or fix the period during which the applicability of the Act shall be removed; in fact, the declaration, "shall not apply," etc., contains no exception or limitation. The learned and astute counsel for the Government contend, or

did contend at the argument of the case below, smashing the rule of the Commission, that the proviso should be construed to read: "This Act shall not apply until *a* terminal is reached. when the crew which has served sixteen consecutive hours on duty shall be relieved."

Does not such a construction, aside from the fact that it involves the experiment of interpolating words into the Act which its framers presumptively, designedly omitted, lead to absurdities? Does it not tend to make the Act the prey of every change in conditions, tolling it today and restricting it tomorrow, according to the will of the person or the body charged with its execution? Is it not a strained effort to make that a misdemeanor which, at the time the act was committed, is clearly not so under the plain and unambiguous terms of the Act? Under such a construction the members of a crew of a justifiably delayed train might lawfully work one hundred hours in excess service in connection with that train, if perchance there were no terminal intermediate the *run* points, while the crew of another train, similarly delayed, could only lawfully continue to work after the 16 hour period expired, up to the first intermediate terminal, if perchance there were one, at which point they must desist and abandon the train and its cargo of human freight, whether there is there a relief crew or not. This construction means that if the carrier maintain no intermediate terminal, the Act is tolled; if it does maintain one, the Act is operative. Such a con-

struction is against common sense and is unreasonable and impracticable, and is therefore to be disregarded, if perchance there is any other possible construction which comports with common sense. The delay that Congress had in mind was a delay, or casualty, or unavoidable accident occurring during the *regular* run after the employee left the initial terminal. It knew, or at least it is presumed to have known, the methods and practices of the carrier in respect to *runs* when the Act was passed; knew that a delay or casualty was as likely to attend train movement during the first ten minutes of the trip, as during the last minute of that trip. Therefore, the delay, casualty, or unavoidable accident contemplated by the statute was one which might arise at any time, and which, when it did arise, relieved the employee affected thereby, as well as the carrier, from the application of the statute. If this be not so, then we are face to face with the absurdity that the only delay, or casualty, or unavoidable accident which tolls the Act, is one which occurs during the sixtieth second of the last minute of the last hour of the 16 hour period of continuous service. Ought so narrow a construction be allowed to prevail in connection with a remedial statute, the penalties denounced by which are only incidental?

Is it not reasonable to suppose that in adopting the proviso, Congress had in mind the drastic prohibitions of the Act which furnished no leeway to the carrier in case of infirmity or calamity and that in respect to train movements the hours defined repre-

sented to the mind of Congress a fair period within which, under established usage, trains could be brought to the end of their runs, namely: a 16 hour period? But that where that could not be done because of misfortune or delay, then that the Act should not apply. What else could it have had in mind? It is expressly provided that certain calamities and certain delays shall toll the Act; and that means *something*. And what can it mean if it does not mean the run between the regular terminals? That this was the intent of Congress appears to be forcefully suggested by the words "not known, etc., when the employee left a terminal."

Under the Government's construction, the carrier which maintains a freight terminal intermediate the *run*, would also be required to have constantly on hand thereat passenger train relief crews to meet any and every possible emergency, or, if having no passenger train crews thereat, it must rob some other crew, or at its peril ship one from some distant point. The exaction of such unreasonable and drastic requirements would make for chaos and confusion and make the carrier the victim of a fate with whose adventure it was not in relation. Is it not more reasonable to suppose that the Congress intended that in every case of delay within the purview of the statute, the carrier should be permitted the exercise of a reasonable discretion calculated to relieve itself of infirmities which adventitious conditions might impose?

Train crews are assigned in advance, and to disturb or rob a single crew, might disturb all crews and thus bring about a suspension of traffic. Surely this was not a condition which Congress had in mind by the adoption of the proviso to the third section. What then is more natural to believe than that it was the intention of Congress to permit a crew starting from a terminal to remain with the train overtaken by delay, casualty, or unavoidable accident until the end of the *run*.

“Congress had the right and power to prohibit the application of all or of only a part of the provisions of the Act in cases of casualties, unavoidable accidents, or acts of God. It enacted that the provisions of this act shall not apply in any case of casualty ” etc., and it made no exceptions.

The construction for which counsel for the Government contend requires the amendment of this prohibition by the interpolation of an exception, so that it will read as follows: “That the provisions of this act shall not apply nor where the delay and which could not have been foreseen, *provided*, that said employee shall be relieved from duty at the first terminal after he shall have been on duty for more than sixteen consecutive hours.”

“But where the legislative body makes no exception to a general and clear declaration of its will, the conclusive presumption is that it intended to make none, and it is not the province of the Court to

do so.” U. S. v. Mo. Pac. Ry. Co., 213 Fed. Rep. 173, and cases therein quoted.

“Another approved rule of construction is that a rational, sensible and practical interpretation of a statute, one which will permit the accomplishment of the purpose of the act, should be preferred to one which is unreasonable or impracticable, or that would hinder or retard the accomplishment of that purpose.” Ibid.

In the last case, at page 174, the learned Judge who wrote the opinion, uses the following pertinent language, which is singularly appropriate to this case:

“There is still another rule of construction that persuades to the same conclusion. This is a suit for the collection of a penalty of \$500 for a violation of this Act of Congress. The act created and denounced a new offense. A statute which creates a new offense and prescribes its punishment must clearly state the persons and the acts denounced. An act which is not clearly an offense by the expressed will of the legislative body before it was done may not be lawfully or justly made such by construction after it is committed, either by the interpolation of expressions, or by the expunging of its words by the judiciary. And as this statute not only failed clearly to denounce as an offense requiring or permitting an operator or train dispatcher to serve beyond the hours limited in section 2 in case of a casualty, an unavoidable accident, or the act of God, but positively declared that in such a case the

provisions of the act which denounced such excessive service, as an offense did not apply, the defendant may not lawfully be punished for such an act.”

And *au fortiori*, when we consider that the Interstate Commission, the body entrusted with the enforcement of this Act, adopted a rule which declared that the act done in this case by defendant was lawful.

But conceding, for the purpose of this argument, the construction contended for by the Government, still we insist that under the pleadings and proof, defendant is not guilty as charged.

The testimony is that train No. 1 ran on its schedule from Las Vegas to Crucero, the junction of the line of defendant with that of the Tonopah & Tidewater [Tr., p. 92], whence it was detoured because of the land slide over the line of the Company last named. By reason of the detourage, the usual mileage of that train was increased 28 miles. The train reached Crucero at 11:55 p. m. on the 3rd. The time consumed by it up to that time was 6 hours and 15 minutes, while the members of the train crew had been on duty for 6 hours and 55 minutes. Ordinarily, trains detoured via the lines mentioned, barring unusual conditions, reached the terminal—Los Angeles—within the 16 hour period.

The train, despite the delay encountered at Jean, reached Crucero at 11:55 o'clock p. m. on the 3rd, on time. At that time the train had been out of Las Vegas 6 hours and 13 minutes, and its crew had been on duty 6 hours and 55 minutes. At Crucero

the train was detoured over the line of the Tonopah & Tidewater to Ludlow, and over that of the Santa Fe from Ludlow to Daggett. In effecting that operation, usual and unusual delays characterized it, so that it did not reach Daggett, where it again entered upon its own rails, until 11:45 o'clock a. m. of the 4th. At that hour the train had been out of Las Vegas about 18 hours, and the train crew had been on duty about 45 minutes longer, or substantially three hours beyond the 16 hour period.

The testimony is also, that although in consequence of the detour, the mileage of the train was increased by about 28 miles, and that ordinarily, in the absence of unusual conditions, the train, as detoured, would have reached Los Angeles on schedule. When the train left Las Vegas, the fact that there was a land slide, or that the train would have to detour via the lines named, was unknown and *unknowable*. When it left Crucero, the fact that it would encounter unusual delays on the lines over which it was detoured, was *unknown and unknowable*. It reached Daggett at 11:45 a. m. the 4th, and, under the warrant of the law and the rule of the Commission, proceeded to Los Angeles, where it arrived at 8:00 o'clock p. m. on the 4th.

It may therefore be successfully claimed that up to the hour the train reached Crucero, on schedule, the extended delay at Jean was without prejudice, save alone that the land slide west of that point, and the cause of that delay, compelled the train to detour.

When the train entered upon the rails of the Tonopah & Tidewater at Crucero, and later those of the Santa Fe at Ludlow, its control was surrendered to the dispatchers of those companies. It had to accept conditions as it found them. In addition to slow movement from weakened or soft track, or light rails of the Tonopah & Tidewater line, it encountered unusual delays of several hours in the aggregate due to causes beyond its control. Also on the Santa Fe line between Ludlow and Daggett like or longer delays were encountered, the result of causes also beyond its control. And it would seem that the Government claims nothing on account of delays up to and including Daggett. It does claim, however, if we apprehend the current of the testimony, that upon reaching Daggett, where the engine crew was changed, the train crew should also have been relieved in some way, somehow, and because it was not relieved at that point, or afterwards at some other point, the law was violated. And the basis of the claim that the law was infringed, is the proviso to the third section *as amended by counsel for the Government*.

Now Daggett was not a terminal or division point of the defendant, and if it was bound to provide a relief crew at that point, it was necessary for it to have assembled it at some other place, such as Otis, San Bernardino or Los Angeles, and to send it to Daggett.

The humanitarian side of the defendant is evinced by its act in relieving the engine crew at Daggett.

Is it not fair to presume that it would have furnished like relief for the train crew if it had been within its power to do so?

The first division point west of Las Vegas was Otis, four miles east of Daggett. Otis was a freight terminal and not a passenger terminal, although freight crews were qualified as passenger crews. Unfortunately, however, there were at that time no available freight crews at that place, they having been put in work service and sent out to the land slide to clear the line. [Tr., p. 96].

We infer inferentially from the trend of the testimony that counsel for the Government has claimed and will claim that while the train was being detoured over the foreign lines, the defendant knew or could have known that the train could not reach its destination within the 16 hour period, and was therefore bound to anticipate that condition and have a relief crew ready at the first available point after the train emerged from the foreign line at Daggett. The answer is, of course, if it was bound to do so, it should have done so or be amenable to the penalties denounced by the Act. Defendant, however, was adjured by the rule declared by the Interstate Commerce Commission that it did not have to provide, and need not provide, a relief crew, and that the belated crew might continue on duty *to the end of the run*; and what better authority could the defendant have had than the mandate of the body charged with the enforcement of the law?

But Los Angeles was far removed from Daggett (158.6 miles west). The dispatcher at Los Angeles, under whose immediate jurisdiction the train crew of No. 1 was, did not know when the train arrived at or departed from Ludlow, on the Santa Fe, because of trouble with the telegraph wires as a result of weather conditions. He knew, however, when the train reached Daggett, and he knew also that after it reached that point it could make Los Angeles as quickly as a relief crew could reach Daggett; and furthermore, was he not relying, as he had a right to rely, upon the rule of the Commission, *supra*? East of Daggett, while on foreign lines, the train in question was a derelict, subject to the caprice of every condition, and without ability to communicate with its own dispatcher. Who knew or could have known when it would reach its own line?

It has been claimed, and doubtless will be claimed, that although there was a failure to provide a relief crew at Daggett, still a crew should have been provided at San Bernardino. The best answer to this contention is the testimony, which shows beyond cavil the impossibility of furnishing any relief crew at that point, except by robbing the regular crews of other trains, and thus create new conditions worse than those then endured. There were no relief crews at that point, and so the original crew continued at its post of duty until the journey was accomplished.

In concluding the argument on this branch of the case, we venture the thought that if there ever was a case where a complete justification was shown under the Act, this is the case. This case, however, in view of the rule of the Commission to which we have frequently adverted, savors of persecution rather than prosecution in good faith. Moreover, the rule of the Commission is right, should be sanctioned and upheld, and the judgment on the three counts under consideration reversed.

While we have doubt as to whether the matter is the subject of an assignment, we call the court's attention to what appears to be a fatal variance between the allegations and the proof in respect to the fifth cause of action in case No. 243. It is there averred that the defendant permitted one Berringer to be and remain on duty, etc. The proof fails to show that Berringer was connected with train No. 1, or any other train on that day, or on any other day.

IV.

COUNTS 6, 7 AND 8 OF CASE NO. 243.

The averments of these counts are, that the defendant, in violation of the Act, beginning at 5:30 o'clock a. m. of October 4th, 1912, upon its railroad between Las Vegas, Nevada, and Los Angeles, California, in connection with its interstate train No. 7, required and permitted (6th count) Fitzpatrick, conductor, (7th count) Roberts, brakeman, and (8th count) Carter, brakeman, to remain on duty

from 5:30 o'clock a. m. of the 4th, to 6:28 o'clock a. m. of the 5th—substantially 25 hours—or 9 hours in excess of the 16 hour period.

The answer to each count is the usual traverse.

The provision of the stipulation of facts [Tr. p. 82] which permitted the defendant without amending its answer, to prove any matter of defense accruing to it, applies to each of these counts.

Testimony and Observations Affecting Counts 6, 7 and 8.

The testimony relating to these counts may be accurately summarized thus:

Train No. 7, on October 4th, 1912, was a limited passenger train. It left Las Vegas at 6:12 o'clock a. m. of that day, and arrived at Los Angeles, the end of that run, on the next succeeding day, the 5th, at 6:28 o'clock a. m., having been on the rails 24 hours and 16 minutes. Its crew which began and continued with it until the end of the run, were those men mentioned in the counts. They went on duty at Las Vegas, the initial terminal point, at 5:30 o'clock a. m. of the 4th, and remained on duty with the train until relieved at Los Angeles at 6:28 o'clock a. m. of the 5th, having been on duty for a continuous period of substantially 25 hours.

The schedule running time of this train between Las Vegas and Los Angeles was 11 hours and 28 minutes. Like train No. 1, embraced in the preceding counts, and for the same reason, it was compelled

to detour via the lines respectively of the Tonopah & Tidewater and Santa Fe, between Crucero, the point of entry on the former, and Ludlow, the point of emergence on the latter. It arrived at Daggett at 2:50 o'clock p. m., and departed therefrom at 3:35 o'clock p. m. on the 4th, and reached San Bernardino at 3:34 o'clock a. m. on the 5th—7 hours and 3 minutes after the expiration of the 16 hour period, so far as the crew were concerned.

After arriving at Daggett, the train crew had been out of Las Vegas, counting from time they reported for duty, 9 hours and 20 minutes, and should, but for delays subsequently encountered, being those hereinafter referred to, have reached Los Angeles, the end of that run, within the 16 hour period, the schedule running time of that train between Daggett and Los Angeles being 5 hours and 35 minutes, and which, added to the 9 hours and 20 minutes, represented a total period of 14 hours and 55 minutes, or 1 hour and 5 minutes less than 16 hours—"so that had there been no delay encountered after No. 7 left Daggett, it would have gotten to Los Angeles within the sixteen hour period." [Tr., p. 98.]

The detour with its resultingly slow movement, served to lengthen the schedule between Las Vegas and Daggett by two hours and 47 minutes. This is determined by a calculation based upon the actual run to Daggett and the scheduled time thence to Los Angeles. In other words, but for the necessitated detour, the train crew should, in pursuance of

the schedule for that train, have reached Daggett about 2 hours and 47 minutes before they did arrive.

The testimony is that there were no negligent or any delays up to Daggett. The detour was accomplished as rapidly as circumstances permitted. The reason, of course, for the detour, was the continuing disablement of defendant's line, due to the unavoidable occurrence of the preceding day—the landslide—already referred to in our discussion of the previous counts, and which detour, we repeat, was accomplished as expeditiously as the circumstances and conditions attending the same permitted.

Therefore, we state, as matter of fact and of law, the defendant, in respect to the movement of train No. 7, throughout that entire trip, was guilty of no act of omission or commission, which directly or indirectly, or at all inspired or contributed to the delays which occurred after the train left Daggett, and but for which it would have reached Los Angeles within 16 hours from the time it left Las Vegas.

After the train left Daggett, it encountered certain serious delays, none of which could have been foreseen when the members of the train crew left Las Vegas, or, if you please, Daggett (not a terminal or division point) or Otis (a freight crew terminal) namely: a delay of 24 minutes (retardation below running time) between Barstow and Victorville due to a heavy wind storm; a further delay of 8 hours and 18 minutes at Hesperia by reason of the main line of the Santa Fe joint track being

blocked at Lugo by the derailment of a Santa Fe freight train caused by a car breaking in two while being pulled into a siding, thereby blocking the main line; and a further delay of 10 minutes at Lugo where the derailment occurred, by reason of the main line being blocked by the wrecking outfit having in tow the derailed car, compelling train No. 7 to run into a siding and back out again in order to get by it [Tr. p. 98, *et seq.*]; the delays in question aggregating 8 hours and 52 minutes.

It is in order at this juncture to state that the line of railroad between Daggett and Colton was owned by and in the exclusive control of, and operated by the Atchison, Topeka & Santa Fe Railway Company, but over which, subject to the direction of the dispatchers of that Company, the defendant, by contract, enjoyed "running rights" for its trains and their crews. The line may, therefore, be termed a joint one for the movement of the respective trains of the contracting parties, those of defendant being moved by and under the exclusive direction of the owning Company, the Santa Fe. The stations respectively of Barstow, Victorville, Hesperia, Lugo and San Bernardino, referred to in the testimony, are severally situated on the joint line intermediate Daggett and Colton. The defendant had no voice or participation in the actual operation of that line, and in fact, its own trains were moved over it solely under the direction of the dispatchers of the owning Company. Therefore, the defendant could not be

and was not in relation with the delays occurring on that line or the cause responsible therefor. So far as it was concerned, they were delays beyond its power to prevent, and which, manifestly, could not have been foreseen when train No. 7 left either Las Vegas or Daggett. That is the testimony. Hence they were delays after leaving a terminal which could not have been foreseen, or a casualty, or unavoidable accident, it matters not which, within the purview of the proviso of section 3 of the Act, which relieved the defendant—and the train crew—from the operation of the act, and brought into operation the rule of the Interstate Commerce Commission which permitted the crew to *continue on duty to the end of that run*.

Undoubtedly, counsel for the Government will make the same contention concerning the train under consideration, that they made, and will make, with reference to train No. 1, namely: that the defendant, after it became advised that the crew could not reach a terminal within the 16 hour period, was bound to furnish a relief crew at the first terminal reached immediately before or after the expiration of the 16 hour period, although to do so involved the sending of a crew from a distant point, namely: Los Angeles.

The testimony shows that the train reached Hesperia at 5:35 o'clock p. m., and departed therefrom at 1:35 o'clock a. m., and that the running time between that point and San Bernardino was 25 min-

utes. We therefore infer that Hesperia was east of San Bernardino about 15 miles, and that Lugo, where the derailment occurred, was between these points. The situation was such, therefore, that no relief crew, had one been sent, could have reached No. 7 until the line was cleared up at Lugo, nor until No. 7 reached San Bernardino. There was no available crew east of San Bernardino except Las Vegas, and none west thereof nearer than Los Angeles. To have sent a crew from Las Vegas was futile, for that would only have extended the delay. There was no available relief crew at San Bernardino, the first terminal reached after Hesperia, and to have had one there it would have been necessary to send it from Los Angeles. Who could tell when the wreck occurred at Lugo, how long it would take to clear the line? The answer to that question only bears upon the question whether the information possessed by the defendant in respect thereto justified it in assembling a relief crew at Los Angeles and sending it forward to San Bernardino. The question is, of course, speculative, not being covered by the testimony.

But, we ask in all candor, after the train reached Hesperia, did the defendant know, or could have known, that the train could not reach Los Angeles within the 16 hour period. That too depends obviously upon the character of the information furnished to the defendant as to the time likely to be consumed in clearing the line. The train reached

Hesperia at 5:35 o'clock p. m. of the 4th. At that time the crew had been on duty 12 hours and 5 minutes. The schedule running time from that place to San Bernardino was 25 minutes, and from the latter to Los Angeles, 2 hours and 30 minutes. Therefore, the schedule running time of train No. 7 between Hesperia and Los Angeles (including the usual stop of 10 minutes at the latter point) was 3 hours and 5 minutes. Add to this 12 hours and 5 minutes for elapsed time, and the total is 15 hours and 10 minutes. Certainly the defendant knew when the train reached Hesperia that if it could depart therefrom within the next ensuing 50 minutes, it could reach Los Angeles within the 16 hour period; aye, presumably, it could have remained there for a further period of 30 minutes and still have reached the terminal within the statutory period.

It is, therefore, not clear how defendant could have sent a crew from Los Angeles to San Bernardino in time to relieve the crew of No. 7, even if it had been bound to do so.

Our argument directed to the preceding three counts applies with the same force to the instant counts, and will not be repeated.

Realizing, therefore, that the questions involved in this case overshadow any mere consideration of money, and concern most vitally the duties of the

carrier under the law, we submit the case believing the considerations herein presented warrant us in earnestly praying for a reversal of the judgment, at least so far as respects the causes of action herein considered.

Respectfully submitted,

A. S. HALSTED,

JAMES E. KELBY,

Attorneys for Plaintiff in Error.

No. 2412.

**In the United States Circuit Court of
Appeals, Ninth Circuit.**

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD
COMPANY, A CORPORATION, PLAINTIFF IN ERROR,

v.

THE UNITED STATES OF AMERICA, DEFENDANT IN
ERROR.

**IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF CALIFORNIA.**

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

ALBERT SCHOONOVER,
United States Attorney.

HARRY R. ARCHBALD,
Assistant United States Attorney.

MONROE C. LIST,
Special Assistant to United States Attorney.

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F. B. Mendenhall

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THE UNITED STATES OF AMERICA, DEFENDANT IN
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BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

STATEMENT.

In order that the contentions of the Government, made at the trial of these cases and now presented to this court for its determination, may be better understood, it is deemed advisable briefly to refer to a few of the agreed and undisputed facts relied upon in support of such contentions.

CASE No. 106.

Case No. 106 consisted originally of five causes of action, all relating to the hours of service of certain telegraph operators of plaintiff in error (hereinafter called defendant). The fourth and fifth causes of action have been disposed of, leaving but the first three for the consideration of this court.

The first cause of action relates to Operator Grandee, who was kept in continuous service from 8 a. m. to 8 p. m., January 19, 1911; and the second and third to Operator Dugan, who was in continuous service for the same length of time, beginning at 8 p. m., January 19, 1911 (second count), and again for 12 consecutive hours, beginning at 8 p. m. the following day (third count). Both of these operators were in the employ of the defendant at Kelso, Cal.

As its excuse for requiring the above service, defendant introduced evidence to show that the same was due to, or necessitated by, an emergency. (Rec. 104, 105.)

By way of rebuttal the Government endeavored to show that the service required of these operators was not due to an emergency, but was the result of defendant's own negligence or lack of precaution. And in support of this contention it was shown (Rec., 109) that between Salt Lake City and Los Angeles defendant maintained 71 telegraph offices, at which it employed 106 operators; that many of these were 3-men, or continuously operated, offices, while others were 2-men offices; that at the time in question defendant maintained no standing list of reserve operators, but that when an operator got sick or quit work defendant had to trust to finding some one off the line to take his place.

In further support of the Government's contention that the defendant was negligent in not main-

taining at least one or two relief operators, attention is directed to the following testimony of the witness Smith (Rec., 105, 106):

At that time telegraph operators were extremely scarce. The Western Union and Postal companies were using a great many operators, and the men preferred to work in Los Angeles rather than go to the desert points, such as Kelso and Otis; they are both in the desert. At that time we had difficulty in getting operators to go there.

The Government also contended that even conceding all the proven facts might have been an emergency at one time, such defense was of no avail to defendant with respect to the service required of Operators Grandee and Dugan on January 19-21, 1911, because the testimony showed:

First. That January 19, 1911, was Thursday.

Second. That beginning Monday, the 16th, and on each of the two following days, the same service was required of both operators as on the days set forth in the complaint.

So with respect to that provision of the act having reference to the hours of service of telegraph operators, the following question is presented to this court for its determination:

QUESTION INVOLVED IN CASE No. 106.

Where an operator, by reason of some emergency, is required and permitted to be and remain on duty for only three additional hours on each of the first three days of a week, instead of the maximum of four

additional hours permissible in such cases, is the carrier thereby excused for requiring and permitting the same operator to be and remain on duty for the same period (12 hours) on the fourth day simply because on the preceding days the full period of service allowable in cases of emergency was not required?

ARGUMENT.

(Case No. 106.)

That part of section 2 of the hours of service act having reference to telegraph operators, reads as follows:

Provided, That no operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day * * * except in case of emergency, when the employees named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four-hour period on not exceeding three days in any week.

The permission given a carrier, in case of emergency to prolong the hours of service of an operator "for *four* additional hours in a twenty-four-hour period on not exceeding *three* days in any week," can not be construed so as to allow these 12 additional hours of "emergency" service to be distrib-

uted over a period of *more than three days* in that week.

The work of the telegraph operator in a day and night office is of such a nature that Congress deemed it advisable to limit his work to 9 hours a day, instead of 16 hours, as in the case of trainmen, and consequently fixed the period of rest of the former at 15 hours a day; of the latter at 8 and 10 hours. And there are many good reasons why the hours of service of an operator should be materially less and his hours of rest more than those of a trainman. The latter is engaged in the movement of but his own train; the operator is connected with, and receives, transmits, and delivers orders affecting the movements of all trains on his division.

In regulating the hours of service of all employees in any manner connected with train movements, Congress considered the necessity of sometimes extending these hours on account of some unavoidable accident or other emergency. With respect to trainmen, the limitation of their hours of service in cases of unavoidable accidents or casualties is indefinite, to be fixed by judicial construction, which phase of the law will be discussed later in this brief in case No. 243. As to the operators' hours of service in cases of emergency, the limitation is definite, fixed by legislative enactment.

In case of an emergency an operator may be employed for "4 additional hours in a 24-hour period *on not exceeding three days in any week.*" By this

plain limitation Congress has said that an emergency can not operate as a legal excuse for prolonging the period of service of an operator on more than three days a week.

It is a well-settled rule that where the language of a statute is unambiguous and its meaning is plain, no room is left for construction.

The fact that the operators in question worked only three and not "four additional hours" does not add strength to the contention of the carrier, nor operate to authorize excess service on the part of those employees four days a week. If such a departure from the plain, unambiguous words of the statute can be said to be even within the reason thereof, it must be conceded that such excess service need not stop at four days, but may continue all week.

We do not doubt that there are many cases of sudden illness that would justify excess service of an operator within the limitations prescribed by Congress; but in fixing this limitation at four hours a day, and three days a week, Congress evidently considered that as sickness and death must be expected, carriers would maintain one or more relief operators and thus take *some little precaution* to avoid the results of causes deemed inevitable.

This course would seem to have been the proper one, particularly in view of the fact that operators were "extremely scarce." But with full knowledge that "men preferred to work in Los Angeles rather than go to the desert points," the record does

not disclose the slightest effort to maintain a single relief operator and thus be in a position to avoid working other operators beyond the limitations prescribed by Congress.

It may be argued that as sickness and death are always uncertain as to time, it would be impossible for the carrier to know how many relief operators it should have in its employ; and to a certain extent this is true. But the fact remains that had the carrier maintained one relief operator it would thereby have been in a position to avoid the acts complained of by the Government.

Every overworked employee presents a distinct danger. (*M., K. & T. v. U. S.*, 231 U. S., 112.)

Even though Congress had not prescribed the limitation of excess service of operators at three days a week, we believe the trial court would still have been justified in directing a verdict for the Government, based entirely on the ground that the circumstances did not present a clear case of emergency, but rather that the excess service of the two operators was due to negligence or lack of precaution.

The facts in the case were not disputed; therefore this question of emergency was but one of law and falls clearly within the rule laid down in the case of *Ellis v. United States* (206 U. S., 257), wherein the court said:

Even if, as in other instances, a nice case might be left to the jury, what emergencies

are within the statute is merely a constituent element of a question of law, since the determination of that element determines the extent of the statutory prohibition and is material only to that end.

This rule was cited and followed by the Circuit Court of Appeals for the Eighth Circuit in the case of *United States v. Southern Pacific Company* (209 Fed. Rep., 562), which involved the excess service of certain operators and claimed to be necessitated by the illness of a third operator.

In the Southern Pacific case the court also said—

that the statute is not violated if no employee worked overtime more than three days out of seven.

There was some testimony to the effect that the delay in getting a relief operator to Kelso was due to the fact that while one was sent there on the 17th it was found necessary to stop him en route in order to establish a telegraph office at the scene of a wreck (Rec., 104, 105); and therefore it may be argued from this that the excess service of the operators in question was the result of an unavoidable accident. In other words, it may be contended that the proviso in section 3 of the act refers to telegraph operators, and that their hours of service should be unlimited “in any case of casualty or unavoidable accident or the act of God.”

This defense is not now open to the carrier, for it was not urged in the court below. In fact, the amended answer expressly disclaims any intention

to excuse the excess service of Operators Grandee and Dugan on grounds other than that of emergency.

The amended answer (Rec., 27) sets up the illness of Starkey and the efforts made to get a relief operator, and concludes as follows:

Wherefore, this defendant says that by reason of the aforesaid facts, an emergency arose and existed which required and made it necessary and imperative for this defendant to require the said J. N. Grandee to work overtime, as alleged in the complaint.

The amended answer is the same with respect to Operator Dugan, the employee involved in the second and third counts.

It is respectfully submitted that as to case No. 106 the judgment of the lower court should be affirmed, and for the following reasons:

First. Because the question of whether the agreed and undisputed facts in this case constitute an emergency was one of law, properly determinable by the court.

Second. Because each of the employees in question was required to work overtime more than three days in a week.

STATEMENT.

(Case No. 243.)

The third, fourth, and fifth causes of action in this case relate to defendant's passenger train No. 1, running from Salt Lake City to Los Angeles; the

three members of its crew, the conductor and two brakemen, however, operated it only from Las Vegas to Los Angeles. (Rec., 91.)

The scheduled running time of No. 1 between Las Vegas and Los Angeles was 13 hours and 30 minutes added to which would be 30 minutes preparatory service, so that under ordinary conditions the crew would be on duty at least 14 hours. (Rec., 100.)

On the days in question No. 1 followed its usual route, except between Crucero and Daggett, a distance of 41.1 miles. Between these points it was required to detour via Ludlow, thus increasing the distance between Crucero and Daggett on account of such detour by approximately 28 miles. (Rec., 92.)

The distance from Crucero to Los Angeles, by the usual route, is 199.7 miles; but by Ludlow, approximately 227.7 miles. (Rec., 92.)

No. 1 suffered numerous delays at or about Crucero, finally leaving there at 3 a. m., at which time the train crew had been on duty 10 hours; and from there to Los Angeles, without detouring, was a run of 8 hours and 35 minutes. (Rec., 102.)

When No. 1 left Crucero it was known to defendant that the crew, if required to continue the operation of their train to Los Angeles, would be on duty over 16 hours. (Rec., 100.)

When No. 1 reached Daggett at 11.45 a. m., the crew had been on duty 18 hours and 45 minutes. (Rec., 98.)

The running time from Daggett to San Bernardino is approximately 4 hours and 30 minutes; from Daggett to Los Angeles about 8 hours. This statement is based upon the actual running time of No. 1 between these points on the days in question, the evidence showing (Rec., 98) that no delays were encountered between Daggett and Los Angeles.

San Bernardino was "a terminal," but was not *the terminal* of No. 1 or of the employees in question. (Rec., 96.)

Emergency crews were maintained by defendant at Los Angeles. (Rec., 101.)

No effort was made to relieve the crew either at Daggett or San Bernardino or by sending out a relief crew from Los Angeles. (Rec., 101.)

The sixth, seventh, and eighth causes of action relate to the train crew of defendant's passenger train No. 7, running between the same points as No. 1, and who were kept in continuous service 24 hours and 55 minutes.

We do not deem it necessary to dwell in detail on the facts with respect to No. 7, except to say that when it reached San Bernardino the crew had been on duty 21 hours and 34 minutes, yet no effort was made to relieve them, "*though it could have been done by sending a crew from Los Angeles.*" (Rec., 94, 95.)

So with respect to both No. 1 and No. 7, the following testimony of defendant is most pertinent:

It is a fact that when we knew these trains were going to exceed the 16-hour limit, we could have gotten relief for them by sending men out from Los Angeles. (Rec., 110.)

The remaining causes of action relate to the several engineers and firemen of certain of defendant's trains who were kept in continuous service in excess of 16 hours. Most of the facts with respect to these causes of action are set forth in a stipulation. (Rec., 82-90.)

In explanation of the service required of these engineers and firemen, the following testimony was given:

I am familiar with the stipulation concerning counts 1 and 2 and counts 9 to 22, inclusive. The purpose of keeping up a certain amount of steam on these engines was for convenience in lubricating. (Rec., 95.)

Referring to the case of trains that were towed in, of which I spoke in my testimony, about keeping up steam for purposes of lubrication, that meant that as long as an engine is under steam or not, the lubrication boxes or valves are taken care of automatically, but when the engine becomes cold the lubrication must be done by hand, and it was to save hand labor that the steam was kept up, and for no other purpose. (Rec., 107.)

QUESTIONS INVOLVED IN CASE NO. 243.

1. Does that provision of section 2 of the hours of service act, requiring that whenever any employee "shall have been continuously on duty for 16 hours he shall be relieved," mean:
 - (a) That he must be relieved only from the particular character of service he has been performing? or
 - (b) That he must be relieved from all service of whatsoever nature?
2. Does a delay to a train by reason of some unavoidable accident automatically extend to the carrier a license to permit the employees thereon to continue the operation of such train to the end of their usual or customary run?
3. Where a carrier fails to relieve an employee after he has been in continuous service 16 hours, can such failure be justified by merely showing that somewhere on its run the train in question was delayed by one of the causes set forth in the proviso of section 3 of the hours of service act?
4. Where a train is delayed by some unavoidable accident, or the like, and by reason thereof the carrier is unable to relieve the employees thereon the very instant their 16-hour period of service expires, does such excusable failure to prevent some excess service on the part of its employees thereby justify the carrier in abandoning, or license it to abandon, all efforts thereafter to provide relief for such employees?

5. Do the words, "a terminal," as used in the proviso of section 3 of the hours of service act, mean:

(a) THE terminal from which an employee in question starts on his trip? or

(b) ANY terminal through which such employee may pass while en route to the end of his usual or customary run?

I.

Whenever an employee has been continuously on duty for sixteen hours he must be relieved, not only from the service he has been performing, but relieved from every kind of service and from all responsibility therefor should the occasion arise.

It will be unnecessary to enter into any discussion of this question, for the reason that this court has already decided the same in favor of the Government in two other cases.

Great Northern Ry. v. United States, decided February 24, 1914; certiorari denied by the Supreme Court on May 11, 1914. (34 Sp. Ct. Rep., 776.)

Northern Pacific Ry. v. United States, decided May 4, 1914. (213 Fed. Rep., 577.)

The same question has also been decided in favor of the Government by the Circuit Court of Appeals for the Eighth Circuit in the case of *San Pedro, Los Angeles & Salt Lake Railroad v. United States*, decided March 27, 1914. (213 Fed. Rep., 326.)

II, III, IV.

The mere delay to a train on account of some unavoidable accident will not license the carrier thereafter to disregard or ignore the mandatory provisions of section 2 of the hours-of-service act.

“The delay,” as used in the proviso of section 3 of the hours-of-service act, does not refer to a delay that

some particular train may have suffered, but has reference to the delay of the carrier in complying with the mandatory provisions of section 2 of the act.

Where it is apparent to a carrier that, by reason of an accident clearly unavoidable, it is unable to relieve an employee before he has been in service over 16 consecutive hours, the duty, nevertheless, still devolves upon the carrier thereafter to provide relief at the earliest opportunity and thereby reduce to a minimum such employee's excess service.

As all the above questions are closely related, they will be considered under one general discussion of the limitations placed upon the mandatory provisions of section 2 of the act by the proviso of section 3.

Section 2 of the act provides:

*That it shall be unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employee subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employee who has been on duty sixteen hours in the aggregate in any twenty-four-hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty. * * **

The italicized portion indicates that provision of the act the construction of which is involved in this case.

The only limitation placed upon these mandatory provisions of section 2 is to be found in the proviso of section 3, upon which the carrier relies as an excuse or justification for its failure to relieve certain employees after 16 hours' continuous service.

This proviso reads as follows:

That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen.

Reading together the mandatory provision of section 2 and this proviso, it is evident that " whenever any such employee of such common carrier shall have been continuously on duty for sixteen hours *he shall be relieved* " unless the failure of the carrier so to relieve him is due to one of the causes named in the proviso.

It is the contention of the carrier that whenever a train is delayed somewhere on its journey by an unavoidable accident, or the like, such unavoidable delay, regardless of its duration, thereafter relieves the carrier from the mandatory provi-

sions of section 2. In other words, the carrier contends that the proviso should be so construed as to mean that any unavoidable delay to a train operates as a license to prolong the hours of service of the employees thereon far beyond the period prescribed by Congress. So to hold would be merely to limit the phrase, "*in any case of casualty, * * **" to its narrow *interpretation* and justify a carrier in operating a train to its final terminal, without relieving the employees thereon, in all cases where that train encounters a delay which could not actually be foreseen when it left a terminal. This would be true even though the unforeseen delay were but half an hour, and the full service required of the employees in order to complete their run might be 18 or 20 hours.

"*The provisions of this act shall not apply in any case of casualty, * * **" should be construed to mean that a carrier will be excused for requiring excess service of its trainmen *and for its failure to relieve them after they have been on duty 16 hours* only in those cases where a casualty, or the like, actually prevents a compliance with the mandatory provisions of section 2.

It was said in *United States v. Farenholt* (206 U. S., 226): "It seems that interpretation is the reading of a statute according to its letter, while construction is the reading of a statute according to its spirit and intent;" and in *Williams v. Gaylord* (186 U. S., 157) the court said: "The very essence

of construction is the extension of the meaning of a statute beyond its letter.”

To illustrate the defendant’s *interpretation* and the Government’s *construction* of the act:

A train leaves W destined for Z. At X, a few miles from W, it is delayed one hour on account of an unavoidable accident. After that, no effort is made to relieve the crew; they continue to operate their train to Z and are there released from duty, having been in continuous service over 17 hours.

The Government contends that such unavoidable accident is not a license to the carrier to require more than 16 hours’ continuous service of its trainmen; that it has but the effect of relieving the carrier from the penalty only in those instances where such accident has a direct or causal connection with the failure of the carrier to relieve the employees at the end of 16 hours.

The defendant says that because “ the provisions of this act shall not apply *in any case* of * * * unavoidable accident ” it is not required to make the slightest effort to prevent excess service on the part of its employees.

In urging such a construction the fact is lost sight of that one of “ the provisions of this act ” is the requirement that an employee *shall be relieved after* 16 hours’ continuous service.

This emasculative construction can be no better illustrated than by the following:

A train is en route from W to Z, which ordinarily consumes about 14 hours. No unavoidable accidents are encountered, but on account of a large amount of traffic to handle it does not reach X, a station midway between W and Z, until the crew has been on duty 10 hours. It is known for some time that they can not reach Z and be relieved within 16 hours, and in order to comply with the requirements of the act, arrangements are made to relieve the crew at Y, where it is calculated the train will arrive approximately within 16 hours from the time it left W. But after leaving X the train is delayed for one hour by some casualty or unavoidable accident, and the provisions theretofore made to relieve the crew are abandoned, for, as the carrier contends, it is under no legal obligations to relieve the crew "*in any case of casualty or unavoidable accident.*"

The above illustration portrays the attitude of the carrier in the present case.

The attention of the court is called to the stipulation (Rec., 82-90), involving eight different freight trains. In each instance a relief crew was sent out and excess service avoided on the part of the conductor and brakemen; and might have been prevented as to the engineer and fireman had the relief crew been sent out sooner. But notice the action of the carrier with respect to the two passenger trains. In each instance the train was delayed by a casualty or unavoidable accident, which,

to a certain extent, jeopardized the lives of its passengers and crew; but instead of thereafter providing relief, *which could have been done*, the carrier requires the same crew, already enfeebled by excess service, to continue the operation of their train to Los Angeles, *and thus continue to jeopardize the lives of the passengers and crew.*

The contention of the carrier amounts to this: That under no circumstances is it required to relieve the crew of a passenger train, and for this reason: A passenger train runs on schedule; in the present case about 14 hours between Las Vegas and Los Angeles. In case the unforeseen does not happen the train will maintain its schedule; therefore, there will be *no necessity* of providing a relief crew; but in case the train is delayed by the unforeseen, there is *no legal obligation* to relieve the crew.

• Looking at it in another way, the contention of the carrier is, that because it could not prevent the unavoidable delay to a passenger train it was not required to prevent excess service of its crew. *In other words, because it could not prevent the passengers and crew being endangered once, it was not required to remove the cause of future hazard.*

This law was passed to meet a condition of danger incidental to the working of railroad employees so excessively as to impair their strength and alertness. It is highly remedial, and the public, no less than the employees themselves, is vitally interested in

its enforcement. For this reason, although penal in the aspect of a penalty provided for its violation, the law should be liberally construed in order that its *purposes* may be effected. (*United States v. Kansas City Southern Railway Company*, 8th C. C. A.; 202 Fed. Rep., 828, and cases cited.)

This liberality of construction applies to that section of the act defining or creating the offense, but is of no avail to the carrier in its attempt to bring itself within the proviso. As was said by Mr. Justice Story in *United States v. Dickson* (15 Pet., 141, 165; 16 L. Ed., 689) :

The general rule of law which has ordinarily prevailed and become consecrated, almost, as a maxim in the interpretation of statutes, is that where the enacting clause is general in its language and objects and a proviso is afterwards introduced, that proviso is construed strictly and takes no case out of the enacting clause which does not fall fairly within its meaning. In short, a proviso carves special exceptions only out of the enacting clause, and those who set up any such exception must establish it as being within the words as well as within the reason thereof.

The defendant offered no evidence to show the least causal connection between the casualties or unavoidable accidents and its failure to relieve the crews after 16 hours' service. In fact the evidence conclusively shows a case of wanton neglect in permitting the passenger crews to operate their trains all the way to Los Angeles.

A carrier should not be excused for wholly disregarding the mandatory provisions of the act with respect to a certain train crew, even though they may have been delayed by an accident clearly unavoidable. There may be times when a carrier, by reason of some accident, is prevented from relieving a crew before they have been on duty *over* 16 hours, but we do not believe that the excusable failure to prevent some excess service is any justification for the failure of the carrier to prevent service many hours in excess of 16. To illustrate our meaning:

A train is en route from W to Z. When leaving Y the crew have been in continuous service 9 hours, but shortly thereafter are delayed by some unavoidable accident, the place of delay being where no relief can be immediately furnished. The crew remain on duty, assisting in removing the cause of the delay, but by the time this is done they have been in continuous service 16 hours and 30 minutes. From the scene of the accident the train proceeds to Z, a run of approximately 7 hours. Long before the wreck was cleared the officials knew that this train could not reach Z within 16 hours, but, in spite of this knowledge, no effort is made to relieve the crew at any place along the line and they are permitted to operate their train to the end of their usual run, their period of service being approximately 24 hours.

Now, this train was delayed by an accident clearly unavoidable, preventing the carrier from

relieving the crew before they had been on duty but little over 16 hours; but can such failure justify the carrier's neglect to provide relief at the earliest opportunity thereafter?

*“Whenever any such employee * * * shall have been continuously on duty for sixteen hours he shall be relieved * * **” unless the failure to relieve him is due to an unavoidable accident, or the like, and not due, as we believe, to the carrier's negligence in failing to take even ordinary precautions to provide relief, particularly when it is apparent that its trainmen, in the absence of relief, must remain in service an excessive number of hours.

It may be argued that it would be a hardship on the carrier to be required to take such precautions to provide relief and thus give to its employees and travelers that protection which we believe the law demands. This argument is a dangerous one and should not be heeded. The question of hardship is a dual one. There may be instances where the sending out of a relief crew might possibly be a hardship on the carrier from a financial point of view; but if we consider this phase of the question we must of necessity and reason consider the question of hardship from the point of view of those employees and travelers whose lives would be jeopardized by some act of omission or commission on the part of some trainman who is both mentally and physically impaired by being in continuous service from 20 to 30 hours.

In no single instance did any unavoidable delay to a train prevent the carrier's obedience to the mandatory provisions of section 2; therefore, there was not the least causal connection between the unavoidable accidents and the failure of the carrier to relieve its employees before they had been in continuous service over 16 hours.

In this connection we desire to call attention to the reasoning of the court in the case of *Newport News & Mississippi Valley Co. v. United States* (61 Fed. Rep., 488). Lurton, then circuit judge, in delivering the opinion of the court, said:

The contention of counsel for appellant is that the excuse for overconfinement specified in the act, "storm," is one of a class within what the law regards as an "act of God," against which a common carrier does not insure, and that Congress has to that class added another of a different character, described as "other accidental causes"; that the use of the disjunctive "or" after "storm" indicates a purpose to except detentions due to causes not the act of God, and described by the term "accidental"; that this construction finds support in section 4388, which imposes the penalty only upon such carriers as "knowingly and willfully" fail to comply with the requirements.

This reasoning, while plausible, is not satisfactory. To yield to it would emasculate a statute having a most humane object in view. Congress did not mean that simply because

the carrier had encountered a storm therefore he should be excused.

It must appear that the storm "prevented" obedience. The storm could not be prevented. Its consequences may be avoided or mitigated by the exercise of diligence. If, with all reasonable exertion, a carrier is unable by reason of a storm to comply with the law, then he has been unavoidably "prevented" from obeying the law. If, notwithstanding the storm, he could, by due care, have complied with the law, then he is at fault, because "his own negligence is the last link in the chain of cause and effect, and in law the proximate cause" of the failure to comply with the law. Therefore, to avail himself of the excuse of "storm," the carrier must show not only the fact of a storm, but that with due care he was "prevented," as an avoidable result of the storm, from complying with the law. We can reach but one conclusion as to the meaning of Congress by the expression "other accidental causes." * * *

An effect attributable to the negligence of the appellant is not an unavoidable cause. The negligence of the carrier was the cause, the unlawful confinement and unreasonable detention but an effect of that negligence.

This last case involved violations of the 28-hour law, in which the carrier is only required to exercise ordinary care in its efforts to comply with the provisions of that act; but under the hours of service act it should not be excused for exercising only ordinary care. The carrier should be held at

least to a high, if not the highest, degree of care, and only the exercise of such care in its endeavor to relieve an employee before he has been on duty over 16 hours should excuse such excess service.

The fact that a carrier exercised the required care to prevent an accident delaying a train does not relieve it from thereafter exercising some care to avoid the consequences of such unavoidable delay. But under no circumstances do we believe that an *excusable* delay to a train is a license for an *inexcusable* delay in relieving the employees thereon after 16 hours' continuous service.

This so-called "license" phase of the proviso was considered in a case against the Southern Railway Co., western district of North Carolina, decided October 30, 1913 (not yet reported). In that case it was the contention of the carrier that it was entitled to operate a train 16 hours and for so much longer as it might be delayed by one of the causes named in the proviso, and without relieving the employees thereon. On this phase of the question the trial court said:

On that I rule that the occurrence of an accident or delay by the act of God or any case of casualty or unavoidable accident while the train is in course of transit from one terminal point to another does not mean that the entire act is suspended as to that train. To hold that the entire act would be suspended as to that train would be to hold that the 16 hours' limit did not apply to

any train between terminals during the progress of whose transit between terminals any delay occurred from the exempting causes named in the statute. The delay might be any number of hours, from 5 to 10, and I hold that the statute does not mean that as to that train the operative period of service is extended from 16 to 21 or 26 hours, according as some delay from the exempting causes may occur whilst the train is in transit. I construe the statute to mean that the hours of service shall be extended in such cases only so far as may be necessary to permit the train to be operated to a point at which, due regard being had to all the circumstances of the particular case and the character of the train, the train crew could be relieved or be allowed to take the rest required by the statute.

Another case involving the same question is that of *United States v. Oregon-Washington Railroad & Navigation Company* (No. 5943), district of Oregon, decided June 4, 1914. The answer of the defendant alleged that the train in question was delayed by certain causes coming within the proviso, "and that by reason of said delays and not otherwise the defendant required said employees to remain on duty 1 hour and 15 minutes in excess of 16 hours, and but for said delays said employees would not have remained on duty any amount of time in excess of 16 hours and would have completed the trip from La Grande to Umatilla in

much less than 16 hours' continuous run." The answer also alleged that the causes of the delay were not known to the carrier or its officer or agent in charge of said employees at the time such employees left "the La Grande terminus" (the initial terminal for that crew).

To this answer the Government demurred and assigned the following grounds of demurrer:

1. It does not appear from said answer that the causes of the alleged delays between La Grande and Umatilla were not known to the defendant or its officer or agent in charge of the employee named in each cause of action of plaintiff's petition at the time he left a terminal.

2. It does not appear from said answer that the alleged delays between La Grande and Umatilla prevented defendant from relieving the employee named in any of said causes of action before he had been continuously on duty more than sixteen hours.

3. It does not appear from said answer that the failure of defendant to relieve the employee named in any of said causes of action before he had been continuously on duty more than sixteen hours was due to a casualty or, unavoidable accident or the act of God; or that the failure to so relieve such employee was the result of a cause not known to the defendant or its officer or agent in charge of such employee at the time he left a terminal and which could not have been foreseen.

4. It does not appear from said answer that defendant made any effort whatsoever to relieve the employee named in any of said causes of action before he had been continuously on duty more than sixteen hours.

In sustaining the Government's demurrer the following remarks of District Judge Bean are pertinent:

In this case the judgment of the court is that this answer does not state a defense. This service act prohibits the company from permitting its employees to remain in service more than sixteen consecutive hours, unless it shall be due to casualty, unavoidable accident, or the act of God, or when the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time the employee left a terminal, and which could not have been foreseen.

So I take it the purpose of this statute is to prohibit a railway company from allowing or permitting its employees to remain in consecutive service more than sixteen hours unless the reason for the delay comes within the particular exceptions of the statute, and therefore it seems to me that where a railway company's train is delayed and the sixteen hours expire, it is the duty of the company to relieve its employees if it can do so by sidetracking its train, if there is a station where it can be done, and that it cannot use the delay as a part of the time necessary to reach one of its terminals; otherwise it might con-

tinue the service for an indefinite length of time. So I take it this answer is not sufficient, and the demurrer should be sustained.

In the case of *United States v. Baltimore & Ohio Railroad Company*, No. 1710, Southern District of Ohio, decided December 17, 1913, the same question was raised. In his charge to the jury, District Judge Sater said:

The defendant's position, if I comprehend it correctly, is this: That where a delay occurs that is excusable under the law, the train crew may then go forward and complete the journey; go forward until it reaches its destination, although in so doing it may run over the 16-hour period; that the common carrier is not then required to relieve the crew, even if it may do so; that the common carrier has the right to have them complete the journey where a delay has occurred which is excusable, even though the time to complete the journey is in excess of the sixteen-hour period. Do I state your position correctly?

Mr. DURBAN. Yes, your Honor, except that we claim that the statute by its terms says that in that case the act shall not apply.

Mr. KING. And provided that the period of the excusable delay equals the period of the excess or the overtime; that is admitted in this case.

The COURT. That is the position of the defense as their interpretation of the law.

The Government takes a different view. Its view is that even though a delay excus-

able in law has occurred, after it is over and the train proceeds the carrier is not excused from working the men or permitting them to work beyond the 16-hour period, or further beyond the 16-hour period than is necessary to relieve them.

This is the Government's position, if I understand it rightly, viz, that men may not be held to their work or permitted to continue it after the 16-hour period a longer time than is necessary to relieve them.

If I understand its position, it is this: Suppose a crew starts on a run that will take 12 hours. It is out 2 hours. A delay occurs which is excusable in law. Suppose it is held there 9 hours; they would have 10 hours more of service if they should complete the whole trip. If they remained on duty to the end of the trip, they would put in 21 hours of work. Now, if I understand the defendant's position, it is that they would have the right to go forward and complete that trip although it might take them 21 hours. The Government's position is that the law does not mean that. The defendant's position is that the law would not apply to that kind of a case. The Government's position is that it does apply and that it does not intend that the men shall work beyond the 16 hours, if they can be reasonably relieved, and, if they reach a point at which they may be thus relieved, it is then the duty of the carrier to relieve them. We have not had this question de-

cided by the higher courts. I have concluded that the position of the Government is correct, and that what the law means is that where a delay has occurred, the crew may go forward operating the train, but that it can not be held in service without violating the law (if the 16-hour period has expired), if a suitable stopping place should be reached at which it may be relieved; and that if such a place is reached and the crew is not relieved, that then there is a violation of the law and the carrier becomes responsible; that it is a carrier's duty to provide in such emergencies at suitable places for persons to relieve men who have served the full statutory period or more on account of some delay which may have arisen.

It will be urged that these views of the several courts, including that of the trial court in the case at bar, are not in harmony with, but antagonistic to, certain administrative rulings of the Interstate Commerce Commission; but we believe that a glance at these rulings will be sufficient to convince to the contrary.

On March 16, 1908, the Commission made the following ruling:

287 (i) Sec. 3. The instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive

the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point.

The " occurrences " that " could not be guarded against " by the exercise of the proper precaution on the part of the carrier include those instances where an unavoidable accident is the direct cause of an employee being on duty over 16 hours, and also where, after he has been on duty 16 hours, there is no " lack of precaution on the part of the carrier " in thereafter providing relief.

In conformity with the Commission's view, that, in order to prevent excessive hours of service, the carrier would send out a relief crew, unless prevented by some unavoidable accident or the like, in which event the crew so delayed might proceed to the end of its run, the operation of its train being in charge of the relief crew, the Commission, on May 5, 1908, made the following ruling:

74. Hours-of-service law. Employees dead-heading on passenger trains or freight trains and not required to perform, and not held responsible for the performance of, any service or duty in connection with the movement of the train upon which they are deadheading, are not while so deadheading " on duty," as that phrase is used in the act regulating the hours of labor.

The law should not be so harshly construed as to compel a carrier at the exact minute the 16-hour period expires immediately to stop a train at whatever point it may happen to be and probably block

its main line until the crew has had 10 hours' rest or until a relief crew arrives. Nor has the Commission, either in its construction or administration of the law, endeavored to place such a hardship on the carrier. But having in mind possible instances where crews can not be relieved after being delayed by reason of unavoidable accidents, regardless of the precautions thereafter taken by the carrier to provide relief, the Commission made the following administrative ruling:

May 25, 1908. Ruling 88.

(b) Section 3 of the law provides that—

“The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen.”

Any employee *so delayed* may thereafter continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip. (See rule 287.) (Italics ours.)

It follows, therefore, that under these rulings an employee may be permitted to operate his train to the end of the run in those instances where he is delayed by “such occurrences as could not be guarded against” and when through “no neglect or lack of precaution on the part of the carrier” he can not be relieved.

Bearing in mind the purpose of the law, together with the fact that "every overworked man presents a distinct danger" (*M. K. & T. v. U. S.*, 231 U. S., 112), it is not an unreasonable construction of the same to hold that whenever an employee in train service has been continuously on duty for 16 hours he shall be relieved, not merely from that particular kind of service, but from any kind of work, unless the carrier's failure to relieve such employee is due to one of the causes set forth in the proviso. We do not believe it is sufficient for the carrier merely to say that a train was delayed by some unavoidable accident, without showing the length of the delay, or the connection between such delay and the failure to relieve the employee at the expiration of 16 hours.

It is respectfully submitted that any unavoidable accident is not, standing alone, a license to a carrier to disregard that provision of section 2 providing that an employee *shall be relieved* after 16 hours of continuous service.

The carrier will, of course, contend that the words "so delayed" refer, not to the delay in relieving an employee after he has been on duty 16 hours, but have reference to *any delay* his train may have encountered by reason of some unforeseen cause after leaving the initial terminal; and therefore unforeseen delays to a train will license *any preventable or inexcusable* delay in relieving the employees thereon.

As the words "so delayed" have direct reference to the word "delay," as used in the proviso, which has already been fully discussed, we do not believe it necessary to discuss any further the carrier's ingenious construction of the hours of service act and the rulings of the Interstate Commerce Commission.

In support of its contention that all its acts, avoidable and inexcusable, are pardoned and condoned when committed subsequent to an unavoidable accident, reference may be made by the carrier to the case of *United States v. Atchison, Topeka & Santa Fe Railway Co.* (212 Fed. Rep., 1000). But we can not entirely reconcile this case with such contention.

In the first part of the decision in the Santa Fe case, much stress is laid upon the construction of the proviso taken in connection with the administrative rulings of the Commission. At the bottom of page 1006, we find this sentence:

In other words, the proviso takes the case out of the operation of the statute in every instance except those in which the officers or agent in charge of the employee *knew*, or could have foreseen, the existence of the cause of the delay at the time such employee left the terminal or starting point.

In other words, if we may judge by the above, the carrier would only be liable for those deliberate and willful acts of its officers and agents; and, therefore, any unforeseen delay to a train automatically

removes the employees thereon from within the provisions of the law. But if this is the correct construction of the act, why the necessity of placing reliance upon the Commission's rulings? And having placed reliance upon such rulings, why lose sight of the fact that the "instances in which the act will not apply include only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers?"

However, later in the decision (p. 1008), we find this construction of the act somewhat modified. The train there involved was delayed by an accident which was admitted to have been unavoidable and unforeseen at the time the employees thereon left their terminal. If we apply the construction of the act as expressed on page 1006 to this train crew, their case would be taken out of the statute and they might operate their train to the end of their usual or customary run. But in this instance, such unavoidable and unforeseen delay does not remove the case from within the statute, for the reason that part of the time consumed in reaching the final terminal was due to hauling a car manifestly in violation of the safety-appliance act.

We have no fault to find with this view of the court; in fact, we are heartily in accord with it. But we believe that if the negligence of the carrier in hauling a car in a manner prohibited by the safety-appliance act does not take the case out of the operation of the hours-of-service act, then negligence in

another form, to wit, negligence in making no effort to relieve an employee at the end of 16 hours' service, should not remove that case from within the provisions of the act.

The criticism we have of this decision is the same we have of the carrier's contention; that "the delay," as used in the proviso, does not refer to the delay which some particular train may encounter and, therefore, excuse excess service of the employees thereon; for it must be remembered that one of the provisions of the act which does not apply in any case of causality, etc., is the provision that "whenever any such employee * * * shall have been continuously on duty for 16 hours he shall be relieved." While we have the greatest respect for the court rendering the decision in this Santa Fe case, we can neither agree with it nor with the carrier in the instant case that it is unnecessary to show any causal connection between a delay to a train on account of one of the causes enumerated in the proviso and "the delay" of the carrier in relieving the employees "so delayed" after they have been continuously on duty 16 hours.

V.

"A terminal," as used in the proviso of section 3 of the hours-of-service act, does not mean, with reference to a certain employee, only THE terminal from which he starts on his trip; it includes both the initial terminal and ANY OTHER terminal that such employee may arrive at and leave while en route to his final terminal, or end of his usual or customary run.

In the Fifty-ninth Congress, first session, April 26, 1906, Mr. Esch introduced H. R. bill 18671, which was referred to the Committee on Interstate and Foreign Commerce. The committee reported the bill back to the House on May 31, 1906, with certain amendments.

The original proviso in section 4 read as follows:

Provided, That the provisions of this act shall not apply in any case where, by reason of unavoidable or unforeseen train accident or act of God occurring after such employee has left *a terminal*, he is prevented from reaching *his terminal* within the time specified in section one of this act.

The committee recommended certain amendments, so that the proviso would read as follows:

Provided, That the provisions of this act shall not apply in any case where, by reason of unavoidable accident or act of God not known to the carrier or its agent in charge of such employee at the time he left *a terminal*, he is prevented from reaching *his terminal* within the time specified in section one of this act.

On May 4, 1906, at the same session of Congress, Mr. Esch introduced H. R. bill 18961, which was also referred to the Committee on Interstate and Foreign Commerce.

That bill made it unlawful to permit an employee "to remain on duty more than sixteen consecutive hours, except when by casualty occurring after such

employee has started on his trip he is prevented from reaching *his terminal*."

On February 20, 1906, Mr. Bede introduced H. R. bill 25757, which made it unlawful to permit an employee to remain on duty more than 16 consecutive hours, "except when by casualty occurring after such employee has started on his trip or by unknown casualty occurring before he started on his trip he is prevented from reaching *his terminal*."

On March 15, 1906, Mr. La Follette introduced Senate bill No. 5133, which is the present hours of service act. This bill gave to the Interstate Commerce Commission full power to prescribe the hours of service of employees connected with train movements. It was referred to the Committee on Education and Labor, and reported by Mr. Doliver, with an amendment, which fixed the hours of service instead of leaving it to the Commission, and which made it unlawful to require service of an employee beyond 16 consecutive hours, "except when by casualty occurring after such employee has started on his trip he is prevented from reaching *his terminal*."

On June 27, 1906, this bill was taken up for consideration and Senator Gallinger proposed a certain amendment, which made the proviso read as follows:

except when by unavoidable accident, or act of God, or resulting from a cause not

known to the carrier or its agent in charge of such employee at the time he left *the terminal*,

to which amendment Senator La Follette proposed to add the following:

or by unknown casualty occurring before he started on his trip.

Senator Foraker proposed an amendment, which if adopted would have made the proviso read as follows:

except when by casualty occurring after such employee has started on his trip he is prevented from reaching *his* terminal.

On January 8, 1907, Senator Dolliver offered an amendment to Senate bill 5133, which eliminated entirely the proviso and made the provisions of the act absolute.

On the same day Senator Gallinger proposed to add the following section to this bill:

SEC. 5. That nothing in this act shall be construed to prohibit or in any way interfere with the employment, with their consent, of men whose hours of labor are affected herein, upon runs, single or turn, which, in the reasonable judgment of the officers of the respective railroads and of the men so employed, can be completed, in the ordinary course of business of the carrier, within sixteen hours.

On January 9, 1907, Senator Brandegee proposed an amendment making it unlawful for a

carrier to require more than 16 consecutive hours' service of an employee, "except when on account of an emergency, which by reasonable care on the part of such carrier, its officers or agents, could not have been avoided, he is prevented from reaching *his terminal*, * * *"

On the same day Senator Scott proposed the following amendment:

This act shall not apply to cases where a continuance on duty beyond sixteen hours will enable an employee to reach *a terminal*: *Provided*, That at the expiration of sixteen hours he is within twenty miles of such terminal.

On January 10, 1907, Senator McCumber offered the following amendment to follow the word "terminal" in the proposed Gallinger amendment of June 27:

or except when by accident or unexpected delay of trains scheduled to make connection with the train on which such employee is serving, he is prevented from reaching his terminal.

Senate bill 5133, as it passed the Senate on January 10, 1907, made it unlawful "to require or permit any employee engaged in or connected with the movement of any train carrying interstate or foreign freight or passengers to remain on duty more than 16 consecutive hours, *except when by casualty occurring after such employee has started on his trip, or by unknown casualty occurring before he*

started on his trip, and except when by accident or unexpected delay of trains scheduled to make connection with the train on which such employee is serving, he is prevented from reaching his terminal."

After passing the Senate, this bill, on January 11, 1907, was referred to the Interstate and Foreign Commerce Committee of the House, and on February 16, 1907, was reported, with an amendment, and referred to the House Calendar. The proviso then read as follows:

Provided, That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen with the exercise of ordinary prudence. (All italics ours.)

The conference committee, in its report on March 1, 1907, agreed upon several amendments, but left undisturbed and adopted the House amendment striking out the words, "his terminal."

At no time thereafter was the slightest effort made practically to stultify the act by permitting an employee, in cases of unavoidable accidents, to operate his train to the end of his usual or customary run, or, in other words, "his terminal."

CONCLUSION.

From the evidence in this case it clearly appears:

That the carrier required certain employees in train service to be and remain continuously on duty more than 16 hours.

That while the carrier relied upon unavoidable accidents as legal excuses for such service, it did not connect such accidents with its failure to relieve such employees before they had been in continuous service more than 16 hours.

That the failure of the carrier to relieve its employees before they reached the end of their runs at Los Angeles was due to its own negligence and not to unavoidable accidents.

That the unavoidable accidents relied upon by the carrier as legal excuses for prolonging the hours of service of its employees were known to the carrier, and its officers and agents in charge of the employees in question, before such employees left a terminal.

Wherefore, it is respectfully submitted that the judgment of the lower court should be affirmed.

ALBERT SCHOONOVER,

United States Attorney.

HARRY H. ARCHBALD,

Assistant United States Attorney.

MONROE C. LIST,

Special Assistant to United States Attorney.

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United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

San Pedro, Los Angeles & Salt
Lake Railroad Company, a cor-
poration,

Plaintiff in Error,

vs.

United States of America,

Defendant in Error.

No. 2412.

PETITION FOR REHEARING.

A. S. HALSTED,

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Filed

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No. 2412.

PETITION FOR REHEARING.

Comes now San Pedro, Los Angeles & Salt Lake Railroad Company, plaintiff in error, and respectfully moves this Honorable Court to grant a rehearing herein, on the grounds, and for the reasons, as follows, to-wit:

I.

The court erred in affirming the judgment rendered below on counts 3, 4, 5, 6, 7 and 8, of case No. 243.

II.

The court erred in not reversing the judgment below upon counts 3, 4, 5, 6, 7 and 8, of case No. 243.

III.

The court erred in holding that subdivision “(i)” of rule No. 287 of the Interstate Commerce Commission, made March 16th, 1908, modified ruling No. 88 of the same body, made June 25th, 1908.

IV.

The court misinterpreted subdivision “(i)” of said ruling No. 287.

V.

Ruling (i) No. 287, and ruling No. 88, of the Interstate Commerce Commission, being necessarily inconsistent, the court erred in not giving effect to ruling No. 88, which was later in point of time.

VI.

The court erred in not accepting and applying ruling No. 88 as one of contemporaneous construction placed upon the act by the body charged with its enforcement.

VII.

The court erred in not holding ruling No. 88 a rule of property and conduct, and in not sustaining it.

VIII.

The court erred in substituting its own construction for that of the Interstate Commerce Commission reflected by ruling No. 88, in respect to an enactment demanding construction.

IX.

The court misapprehended the scope and meaning of ruling (i) No. 287, and hence misinterpreted said ruling.

X.

The court erred in holding that “from the evidence

it cannot be doubted that the train crew of train No. 1 could have been relieved both at San Bernardino and at Daggett" or at any other place.

XI.

The court erred in holding that the plaintiff in error was required to relieve the train crew of train No. 1, either at Daggett or San Bernardino, or any other point short of Los Angeles, the end of the run.

XII.

The construction given by the court to the first proviso of the third section of the act is erroneous, and in any case it is in conflict with the declared construction thereof by the Interstate Commerce Commission, as manifested by said ruling No. 88.

May It Please Your Honors:

In view of the fact that we were generously and patiently heard upon the submission of the case to Your Honors, and in view of the fact that Your Honors squarely met and decided every point presented for decision, we confess to some embarrassment in making this application, and are only constrained to make it because we feel strongly, with all due respect to Your Honors, that the decision of the court upon the questions hereinabove specified tends to work a nullification of the proviso mentioned, and thereby to deprive the plaintiff in error of the benefit thereof, and, accordingly, we feel that we will not have performed our full duty to our client, and as officers of the court, until and unless we shall have asked this Honorable Court to re-examine and reconsider its decision.

There is a moral side to this case which should not fail of appeal to Your Honors, and that is, that if the act was violated in the respects alleged in the counts *supra*, it was unwittingly violated by the plaintiff in error relying upon the contemporaneous construction placed upon the act by the Interstate Commerce Commission, and conforming its conduct and practices thereto. It is all very well to say that everybody is supposed to know the law.

“The fact that intelligent and fair minds have been in doubt, and have differed on the subject, and an examination of the section itself, both concur to show that, at most, the construction claimed by the government, though it be possible, is doubtful.

“In construing a severe statute declaring a heavy forfeiture (and, according to one construction, claimed for small offenses), it is just to say that those who are called upon to conduct their business affairs in view of all its provisions, ought to be fairly apprised of its requirements, and of its penalties, of whatever kind.

“They are bound to know the law, but lawmakers owe to them the duty to make the law intelligible; and those whose business it is to construe or expound a law which is of doubtful or double meaning should not incline to the harshest possible meaning, when it is obvious that *those* to whom it is to be *applied* may well have been led to trust in another which is less severe, but equally satisfying its terms. This is not saying that laws of the kind in question are to be strictly construed in favor of the subject and against

the state, but only, that they should be construed with reasonable fairness to the citizen.”

27 Fed. Cas., 332; Case No. 15,960.

That construction, until it was modified, became an integral part of the law as much as though it had been written in it, and now to declare that construction faulty in reference to an act committed while the construction remained in effect, is to brand the plaintiff in error as a lawbreaker, and incidentally to deprive it of its property.

Here is an act, upon the true construction and meaning of which intelligent minds may well and do differ, and which received construction by the body charged with its execution. What better resolution could it have made? And is the plaintiff in error to be penalized in conforming thereto? The very thought is abhorrent to one's sense of justice, and it is for yielding obedience to the law, as thus construed, the plaintiff in error will, if the judgment in this case shall stand, be deprived of its property. Is it possible that, if our views are sound, the judgment herein can stand?

ARGUMENT.

POINT 1.

THE TWO RULINGS MADE BY THE INTERSTATE COMMERCE COMMISSION.

Rule No. 287 (hereinafter referred to as rule A) was formulated on March 16th, 1908.

Subdivision (i) of section 3 of this rule reads:

“The instances in which the act will not apply in-

clude only such occurrences as could not be guarded against; those which involved no neglect or lack of precaution on the part of the carrier, its agents, or officers; and they serve to waive the application of the law to employees on trains only until such employees, so delayed, reach a terminal or relay point."

Rule No. 88 (hereinafter referred to as rule B) was formulated on June 25th, 1908, and reads:

"The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employee at the time said employee left a terminal, and which could not have been foreseen."

"Any employee so delayed may therefore continue on duty to the terminal or end of that run. The proviso quoted removes the application of the law to that trip."

Before passing to a consideration of the two rulings, it may not be amiss at this juncture to state that the act was approved March 4th, 1907, and that by section 5 thereof it took effect one year after its passage, or on March 4th, 1908. It thus appears that rule A was formulated substantially contemporaneous with the going into effect of the act (12 days after), and that rule B was formulated June 25th, 1908, or substantially three months after rule A was formulated.

It must not be forgotten that rules A and B are denominated in the evidence "Conference Rulings on the Hours of Service Law by the Commission," implying,

as we think, a conference between the Commission and representatives of the carriers affected by the act, and hence, that the rulings were those in respect to direct inquiries put by the carriers; but it is enough for our purposes that the rulings were made.

Undoubtedly, as Your Honors stated, the purpose of Congress in postponing the effective date of the act one year after its approval was to give the carriers ample time to conform their practices to these requirements.

ANALYSIS OF THE RULES.

What can be plainer than what the Commission attempted by these rules was to define the meaning of the causes specified in the proviso which, when they, or any of them, existed, removed its application, as those (1) which could not be guarded against; and (2) those which involved no neglect or lack of precaution upon the part of the carrier, its agents or officers?

Strictly, it added nothing to the sum or meaning of the act, or its terms, except, perhaps, to serve to restrict the meaning of the term "casualty." It added nothing to, nor took anything from, the terms respectively "unavoidable accident" or "act of God"—those terms, well understood in law, required no exposition or elucidation; nor did they add to or take from the words "nor where the delay," etc. Exposition was superfluous there. Therefore, the only change made by the rulings was, if you please, to constructively interpolate the word "unavoidable" before, and to qualify the word "casualty," and thus, in effect, put it in the

category of unavoidable accidents, but really to eliminate it altogether. Simmered down, it is as though the rule announced that the term "casualty" as found in the proviso, is defined to be an "unavoidable casualty," and stopped there, and, *presto* (when any such occurrence existed), they served TO WAIVE THE APPLICATION TO EMPLOYEES ONLY UNTIL SUCH EMPLOYEE SO DELAYED REACHED A TERMINAL OR RELAY POINT.

Here, then, is an attempt to fix the time or place at which the act, previously justifiably suspended, shall be restored to its vigor, and such time or place a terminal or relay point. Unfortunately neither the word "terminal," nor the term "relay point" are defined. "Terminal" means and implies *termination* in railroad parlance—"end of the run." No difficulty exists with the term "relay point," which is a place of rest or relief; in railroad parlance, a point established for the relief of train or engine crews, or both. The presumption will be indulged that the Commission were speaking in terms of railroads, and, thus understood, the implied command was that the employee delayed in excess of sixteen hours continuously, must be relieved at the first "relay" point established by the carrier in the usual course for relieving crews of the class delayed. The Commission knew that the carriers had, in order to conform to the act, established exclusive relay points for engine crews, freight crews, passenger crews, and for local as well as through passenger crews respectively, and nothing in the rule indicated that the Commission intended or desired to disturb those arrangements.

Rule B of this ruling is so clear and obvious that it needs no construction. After quoting the proviso, the rule announced:

“ANY EMPLOYEE SO DELAYED MAY THEREAFTER CONTINUE ON DUTY TO THE TERMINAL OR END OF THE RUN.” and further: “THE PROVISIO QUOTED REMOVES THE APPLICATION OF THE LAW TO THAT TRIP.”

No ambiguity exists here. The words are plain, simple, direct and expressive, and leave us in no doubt as to their meaning. Here the terminal is fixed as *the end of that run*. “Run” and “trip” are used interchangeably, both words serving to accentuate the meaning; and this, mark you, the Commission, the body specifically charged with the enforcement of the act, proceeds to declare its judgment is that the proviso quoted removes the application of the law to that trip.

Granting that the two rules are in *pari materia*, they are, under well settled principles of construction, to be construed together, and effect given to each if possible. If, however, they are conflicting and inconsistent, then, to the extent of the inconsistency, the later declaration must prevail.

Tested by this rule, what is the result? If it be insisted that the necessary effect of rule A is to require the carrier to relieve the crew at any point short of the *end of the run*, certainly a reasonable construction, then, to that extent, it is in hopeless antagonism to, and irreconcilable with, rule B. The twain cannot stand—the one must go, and that one rule A; otherwise, in all other particulars, both declarations may stand together. It does not need any argument to

demonstrate the correctness of this conclusion—it is self-evident.

Just how Your Honors regarded this situation is not clearly disclosed. All that the opinion states is, “that ruling (rule B) must be read and considered with the preceding ruling of the Commission of March 16, 1908” (rule A); also, “and must also be read and considered in connection with the action of the Commission shown by the record in this case, that the suit was directed to be brought by the attorney general at the request of the Interstate Commerce Commission.”

We agree with Your Honors that the two rules must be read and considered together, and thus agreed, we ask in all candor, what is the logical effect if it is not that already stated?

As to the other phase of the matter suggested by the opinion, which refers to the bringing of the action by direction of the attorney general at the suggestion or request of the Interstate Commerce Commission. We do not understand whether Your Honors assigned any importance to the language which is set forth in the complaint—“this action being brought upon the suggestion of the attorney general of the United States at the request of the Interstate Commerce Commission, and upon information furnished by the Commission.”

The language used, as we view it, means no more than that the action is brought at the request of the Commission upon information furnished by it, with the consent of the attorney general. It surely does not import that the attorney general, as the result of an independent examination and study of the act, has disapproved rule B. Rather does it mean that the action

was begun and is being maintained by the direct request of the Commission, and that the Commission is sponsor for it.

Therefore, yielding to the court's suggestion that this also must be read and considered in connection with rules A and B, we proceed briefly to do so; and so doing, we find that the Commission has flopped, and by inference broken away from its own rule—the rule of reason. The Commission had heaven's license to err, and afterwards to correct the error, but we humbly submit, it should have renounced its error, if error it was, in the same formal fashion that it fashioned it, and in that way and in that manner afford the carriers of the country an opportunity to offend wittingly.

The first and only notice that the Commission gave to the plaintiff in error, or other carriers, that it had renounced its *rule of reason*, was the commencement of the action. No gentle, nor any, admonition that we were offending the law was ever previously lodged with us. Ours was a security no less certain than the deceptive quicksands of the Platte River. Because we accepted the rule of the Commission and shaped our course and conduct with reference to it, and in reliance upon it, shall we be compelled to suffer in our good name and be deprived of our property also? What we did was not, at the time we did it, under the rule, an offense, but only became such after it was done.

Under rule No. 88, our defense was complete. Under the rule of recession, never promulgated, we were without defense.

The Commission never assailed seriously the sufficiency of our defense as excusing the delay; indeed, it practically admitted it. Its latest theory was that we should have relieved the train crew at the earliest possible moment, to-wit: at either Daggett or San Bernardino, and because we failed to do that, we were guilty of negligence, which made us liable under the law.

We shall not go further over that ground again here, which, on the facts, has been resolved against us, and, as we think, incorrectly, except to say that unless we were required to send relief crews from Los Angeles to either Daggett or San Bernardino, it was impossible for us to have provided relief, and, therefore, as matter of fact, we were not guilty of any want of care; in any event, it is our firm belief that that question should have been submitted to a jury.

POINT II.

But, Your Honors say, "But over and above that, it is the obvious duty of the court to give effect to what it conceives to be the true construction of the act of Congress."

This expression of the court, therefore, makes it essential that we respectfully present a line of cases which will appeal strongly, and, we trust, successfully, in behalf of the proposition that under the circumstances of this case the court should give its support to our contention, that the construction of the Interstate Commerce Commission, known as rule 88, should be fully sustained by Your Honors, rather than annulled.

“CONTEMPORANEOUS CONSTRUCTION. Primarily it is the function and duty of the courts to interpret the meaning of a statute, and where they can ascertain the legislative intent by the use of intrinsic aids alone, resort to its contemporaneous construction by other persons is both unnecessary and improper. But where the language of the statute itself is ambiguous or uncertain, the opinions entertained by contemporaries as to its meaning are frequently the best guides to the legislative intent.”

“EXECUTIVE CONSTRUCTION. The construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration, especially if such construction has been made by the highest officers in the executive department of the government, or has been observed and acted upon for many years, and such construction should not be disregarded or overturned unless it is clearly erroneous.

“The consideration to be accorded executive construction is also especially weighty in the case of statutes prescribing penalties, or levying impositions, where the executive construction has been in favor of the persons affected; or, in cases where the executive construction has been impliedly indorsed by the legislature.

“To the extent that a reversal of the executive construction would result in depriving persons affected of vested rights in property, or contract, the executive construction will be regarded *as conclusive*.”

36 Cyc., 1139-40-41. Citing many cases.

And in *Pennoyer v. McConnaughy*, 140 U. S. 1-25, 35 Law. Ed. 363, the same principle is thus laid down, on page 370 of the latter:

“The principle that the contemporaneous construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our jurisprudence that no authorities need be cited to support it. On the faith of a construction thus adopted, rights of property grow up which ought not to be ruthlessly swept aside, unless some great public measure, benefit, or right is involved, or unless the construction itself is manifestly incorrect.”

In *U. S. v. Moore*, 95 U. S. 760, 24 Law. Ed. 588, decided 1878, the court say:

“The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. (Citing *Edwards v. Darby*, 12 Wheat. 210; *U. S. v. Bk.*, 6 Pet. 29; *U. S. v. McDaniel*, 7 Pet. 1.)

“The officers concerned are usually able men, and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret.”

And to the same effect is *Brown v. U. S.*, 113 U. S. 568-574, 28 Law. Ed. 1080, as follows:

“It must be conceded that were the question a new one, the true construction of the section would be open

to doubt. But the findings of the Court of Claims show that soon after the passage of the act the president and the navy department construed the section to include warrant as well as commissioned officers, and that they have since that time uniformly adhered to that construction, and that under its provisions large numbers of warrant officers have been retired. This contemporaneous and uniform interpretation is entitled to weight in the construction of the law, and in a case of doubt ought to turn the scale. In *Edwards v. Darby*, 12 Wheat. 206, it was said by this court that ‘In the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law, and were appointed to *carry its provisions into effect*, is entitled to great respect.’ This case is cited upon this point with approval in *Atkins v. Disintegrating Co.*, 18 Wall. 301, 21 Law. Ed. 844; *Smythe v. Fiske*, 23 Wall. 382, 23 Law. Ed. 49; *U. S. v. Pugh*, 99 U. S. 265, 25 Law. Ed. 322, and in *U. S. v. Moore*, 95 U. S. 763, 24 Law. Ed. 589. In the case last mentioned the court said that ‘The construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons. The officers concerned are usually able men and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called up to interpret.’ And in the case of *U. S. v. Pugh*, the court said: ‘While, therefore, the question, “the construction of the Abandoned Property Act,” is one by no means free from doubt, we are not inclined to interfere at this late

day with a rule which has been acted upon by the Court of Claims and the executive for so long a time.' (Citing cases.)

"These authorities justify us in adhering to the construction of the law adopted by the executive department of the government, and are conclusive against the contention of appellant that section 23 did not apply to warrant officers."

The precise question in controversy here was judicially determined and decided for the first time in the case at bar. While the "Hours of Service Act" had been before the courts in one or more phases, in no case was the identical question involved here in case No. 243 ever presented for decision. The nearest approach to it was by the Eighth Circuit in *U. S. v. Kansas City Southern Ry. Co.*, 202 Fed. 828. But while the same proviso was discussed in that case, it was not invoked by the defendant there because of any delay caused by storm and landslide. No such condition figured in that case, while it is the sole and only condition in the case at bar.

In the former case the carrier sought to excuse itself under that part of the proviso of the statute which excuses the carrier "where the delay is the result of a cause not known * * * at the time said employee left a terminal, and which could not have been foreseen." But the cause or causes there presented as defenses were substantially three, to-wit: (1) the steaming qualities of the engine coal; (2) the leaky flues of the engine, and (3) the defective shaker rod for cleaning the engine grates.

It will be seen at a glance that these defenses are purely economical. They relate only to maintenance, equipment, and service conditions; and to keep up the necessary standard in that behalf the carrier is always held to a high degree of care and diligence. And the appellate court held in that case that the carrier under its defenses had fallen short of the essential proof that it "had taken sufficient precaution to see that its engine was in proper condition when it started, and whether the delays which occurred were the result of causes which could not have been foreseen by the exercise of the necessary diligence and foresight."

That case, therefore, throws little or no light upon the question presented here.

The question presented here involves nothing of railroad economics, of defective engines, bad coal, impaired appliances, trains, or cars. Concerning all these things diligence and foresight are cardinal duties of the carrier. But "diligence and foresight" do not enter into the question at bar. That question is purely one of physical fact and visible result. That question is, was the delay the result of a landslide not known, and which could not have been foreseen when the employees left Las Vegas, the initial terminal. The proof is all one way that neither the storm nor the landslide were known or could have been foreseen, because they both happened after the employees left the said terminal.

Neither the storm nor the landslide could have been anticipated or avoided by the exercise of due diligence

and foresight, or, indeed, by even the highest degree of such human qualities.

Nor does the later case of *U. S. v. Mo. Pac. Ry. Co.*, 213 Fed. 169, throw any light upon the case at bar. The question there was whether telegraph operators, train dispatchers and employees of their class were included within, or excepted from, that part of the proviso in section 3 of the act reading "that the provisions of this act shall not apply in any case of casualty, or unavoidable accident, or the act of God." The latter part of the proviso, which reads, "nor where the delay was the result of a cause not known to the carrier," etc., was not considered at all, as there was nothing in the case to make it applicable.

So, then, if Your Honors please, up to the decision in the case at bar, we have this condition of things: The Hours of Service Act was approved and became a law March 4, 1907. It did not, however, go into effect until one year thereafter, or March 4, 1908.

Section 4 of the act reads as follows:

"Sec. 4. It shall be the duty of the Interstate Commerce Commission to execute and enforce the provisions of this act, and all powers granted to the Interstate Commerce Commission are hereby extended to it in the execution of this act."

Acting under the authority of said section 4, the Commission did, within about three months after the law became effective, ordain and establish, for the information and benefit of all corporations and persons affected by the act, the following interpretation,

rule, or construction of the latter part of the proviso above quoted, to-wit:

“Any employee so delayed may, therefore, continue on duty to the terminal or *end of that run*. The proviso quoted removes the application of the law to that trip.”

Now, if Your Honors please, the above construction of that part of the proviso by the body possessed of full executive functions over that act, became and remained virtually the law of the land, and stood as a guide and a protection to all persons and corporations within the provisions of that act. And it was felt and believed to be a haven and a refuge to the defendant company at any and all times since it was pronounced, and was at all times so acted upon by the company.

Such construction of that part of the proviso was substantially contemporaneous with the law's going into effect. And it is a construction acted under for over six years. It has never been changed, altered or modified, either by the Commission or by Congress, and, except to the extent that it may be annulled by the decision of Your Honors in the case at bar, it is still the executive construction of that part of the “Hours of Service Act.” It is the last word of the Commission upon that subject, and if there be anything repugnant or contradictory in any antecedent rule or opinion of the Commission, then, under analogy to the construction of statutes, this latest expression should prevail.

“As between conflicting statutes the latest in date will prevail, so between conflicting sections of the

same statute the last in the order of arrangement will control.”

11 Fed. Cas. 224, citing Bac. Abr., Stat. D; Dwarris, 156, note; Brown v. Co. Com., 21 Pa. St. 37; Smith v. Moore, 26 Ill. 392.

If this executive construction can be sustained the defendant company should be discharged. Because it is only then necessary to determine what the words “that trip” and “the end of that run” mean, as used by the Commission. On this point there would seem no ground for debate.

Los Vegas and Los Angeles were the termini of “that trip,” the former the initial and the latter the ending terminus. “That run” began at Las Vegas and “the end of that run” was Los Angeles; the same being a passenger division of the road and measured and apportioned to meet the requirements of the “Hours of Service Act.”

“Where the proper interpretation to be given a statute is a matter of doubt, the practical construction which it has received from those charged with its execution will prevail.”

In re Board of Street Opening and Improvement, 12 Misc. Rep. 526, 33 N. Y. Supp. 594;

In re 136th St., *id.*;

U. S. v. Bellm, 182 Fed. 165, citing U. S. v. Ala. R. R. Co., 142 U. S. 616, 35 Law. Ed. 1134.

In the latter case, at page 1136, the court say:

“We think the contemporaneous construction thus given by the executive department of the government and continued for nine years through six different administrations of that department; a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case,—should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the government. These principles were announced as early as 1827 in *Edwards v. Darby*, 25 U. S., 12 Wheat. 206-210, and have been steadily adhered to in subsequent decisions. *U. S. v. State Bank North Carolina*, 31 U. S., 6 Pet. 29, 39; *U. S. v. Macdaniel*, 32 U. S., 7 Pet. 1; *Brown v. U. S.*, 113 U. S. 568; *U. S. v. Moore*, 95 U. S. 760, 765.” (See also *Baker v. Swigart*, 199 Fed. 867.)

In this last case this court, speaking through His Honor Judge Ross, said:

“The first thing to do in such a case is to see just what the lawmaking power has enacted. If the provisions of the statute are plain and unambiguous, the courts must accept the law as there declared; otherwise they would usurp the function of the legislative department of the government. Of course, if the provisions of the statute in question be uncertain, conflicting, or ambiguous, they become the proper subject for construction, which is a function of the court, in which event and in aid thereof resort may be had to any construction put upon it * * * by that department of the government charged with the execution of the law.”

“Where there is such an ambiguity in a penal statute as to leave reasonable doubt of its meaning, it is the duty of a court not to inflict the penalty.”

The Enterprise, 8 Fed. Cas. 732, Case No. 4499.

In U. S. v. Cerecedo etc., 209 U. S. 337-339, 52 Law. Ed. 821, the court say:

“We have said that, when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution. *Robertson v. Downing*, 127 U. S. 607, 32 Law. Ed. 269; *U. S. v. Healey*, 160 U. S. 136, 40 Law. Ed. 369. Judgment reversed.”

Mr. Justice White and Mr. Justice Peckham concur solely because of the prior or administrative construction.

See also

U. S. v. Burkett, 150 Fed. 212.

The words "terminal," "terminal point," "relay point," "trip," and "run" or "the end of the run," are pretty generally understood in railroad circles, and are of very common use. It is, perhaps, for that reason that judicial definitions of them cannot be found.

In 38 Cyc., p. 1995, it is said:

"‘Trip,’ in its ordinary signification, is a journey, jaunt or excursion by some person. In relation to transportation it is the performance of service one way over a route."

And in note 23, same page, it is said:

"It ordinarily conveys the idea of transportation in one direction. Unless connected with some other expression it does not carry the idea of a return. A ‘continuous trip’ does not add to the import." (Citing *Kelly v. N. Y. City R. Co.*, 197 N. Y. 97-102, 103, 84 N. E. 569.)

And in 38 Cyc. 187 "terminal" is defined as "forming the terminus or extremity"; and in footnote 41, same page, it is said:

"‘Terminal facilities,’ as understood by those operating railroads, do not include tracks other than those used in making up trains. ‘Terminal point,’ in reference to an interstate shipment, is the place of consignment, or the point at which the carriage of one common carrier ends and that of another begins." (Citing 47 Fed. 406.)

POINT III.

THE PROVISIO.

The opinion concedes that plaintiff in error was entirely justified in continuing its train crew up to the time it could, with the exercise of proper diligence, have relieved it; that it had an opportunity to relieve the crew at Daggett or San Bernardino, or both, and was required by the act, properly construed, to avail itself of that opportunity.

Earnestly insisting that the evidence does not, in our opinion, disclose an opportunity to plaintiff in error to provide relief to the crew of train No. 1, or train No. 7, and that the evidence fails utterly to show an opportunity to relieve the crews of either train, and that on the facts the cause should have been remanded for retrial of that question, we proceed to examine the construction placed upon the act by Your Honors in this case.

It is to be observed at the outset that the court's construction of the act destroys rule B, and breathes new life into rule A, although the latter is only an effect.

The opinion concedes an occurrence which, by the express terms of the proviso, made the act inapplicable to the crews of Nos. 1 and 7—that is, concedes the existence of a cause which, when it existed, made the statute inapplicable.

It will, we think, be also conceded that the act itself had no application to either crew until the expiration of the sixteen-hour period—the hour which set it in

operation. After the expiration of that period no cause could arrest the operation of the statute; and, necessarily, the only cause which could defer its application would be one occurring before the act pressed down upon the parties to be governed by it. Such a happening may occur at any time within the sixteen-hour period; the first minute of the first hour, or the last minute of the last hour, but not afterwards; and when it occurs and is productive of delay, it is protected by the proviso. It is not the happening itself but the delay which it occasions which makes the statute inapplicable. This seems to be made clear by the words, "nor where the delay," etc., and, unquestionably, the design of the framers of the proviso was to make the act inapplicable to excess hours resulting from any of the causes specified—causes beyond the power of the carrier to prevent. Logically, therefore, in every such case of excess hours the act never applied. It is as though the statute were non-existent. It is not a case of suspension of the operation of the act but a case in which there is no act to suspend.

The opinion concedes that at the time the crew reached Dagget the act had not been infringed, although at that time the crew had been on duty for a continuous period of more than sixteen hours. In other words, up to that time the train and its crew were not subject to the act. If this be true, the act would not again be operative or applicable until the expiration of the sixteen-hour period after leaving that point, and that period was never reached, the crew having been relieved long before that time was reached.

Is not this the true construction of the act? If yes, none of the counts involved stated a cause of action, and the judgment should be reversed.

The language of the proviso contains no words fixing any period during which the act shall not apply, and if it was the intention of the law makers that the act should be suspended only until the effect of the cause were off and ceased to exist, they certainly failed to express it. What they did was to state "this act shall not apply * * *." Is there any need here for construction?

The necessary effect of the construction of Your Honors is to inject into the proviso words not found there, substantially as follows: "The provisions of this act shall not apply * * * but every employee detained by reason thereof shall be relieved at the first terminal or relay point." Such improvisation is necessary to sustain the construction, to sustain the findings and judgment in this case.

But the proviso under consideration performs a more important function than that performed by the ordinary proviso, which is to state an exception; this proviso prescribes a condition which operates to place certain matters entirely outside of the reach of the statute.

Conclusion.

That the position of counsel be not misapprehended or misunderstood, we are not before Your Honors to contend for a moment that the judicial power does not extend to a sweeping obliteration of any contempor-

aneous or executive construction of a statute or any part thereof.

And the fact that such construction may have received the sanction of ages would not of itself defeat or lessen the judicial dominion of courts over the interpretation and construction of laws.

That is a function, a prerogative, a power so inherent that to question it would evince a type of professional ignorance which, in our opinion, does not exist.

It is this very power which in time of stress not only gives protection to the citizen and subject, but stability to the state.

"Know the law and obey it," is the command of the higher civilization. And it is right that it should be so.

Equality before the law not only makes the nation strong, but the citizenship virtuous and just. No man can justly complain if the law be justly administered.

If Your Honors' decision in the case here were made upon an open statute, expounded for the first time, we see nothing at all in it that could not be regarded as persuasive of a proper judicial interpretation of the act. The supplication we make is not against the power and the duty of the court to construe the act in the light of wisdom and according to conscience. This must be conceded to the court regardless of other interpretations and other views.

What we do, with most respectful deference, beg of Your Honors, is that you measure our condition by the situation meted out to us by the Commission.

Whether the Commission's construction of the proviso in question was in accord with the literalism

thereof is not so much the question with us as is the fact that such views were contemporaneously pronounced by a body of experienced and learned men to whom was committed the power to execute the law. If the advice and the opinions of such men were not intended to be of the prime significance and importance to all those subject to the operation of the law, then the Congress made a mistake in committing to them an authority so comprehensive and so vast.

We must conclude, however, that in the exercise of their authority the Commission has so aptly and so appropriately met the wishes and the views of Congress that no one of its rulings, though numerous and broadcast, and in existence for years as executive beacons illumining the act, has ever received the dissent of Congress, or been the subject of critical debate.

Respectfully submitted,

A. S. HALSTED,

J. E. KELBY,

Attorneys for Plaintiff in Error.

No. 2414

United States
Circuit Court of Appeals
For the Ninth Circuit.

[Handwritten signature]

for the District of Montana.

Filed

AUG 27 1914

F. D. Monckton,
Clerk.

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Respectfully submitted,

A. S. HALSTED,

J. E. KELBY,

Attorneys for Plaintiff in Error.



State of California,)
 (
County of Los Angeles,)

vs.

I hereby certify that in my judgment the foregoing petition
for rehearing in the above entitled cause is well founded, and that it
is not interposed for delay.

James E. Kelly

Attorney for Plaintiff in error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

JENNIE PETERSON (Formerly JENNIE
BENEDICT), WILLIAM H. ALBRIGHT
and VILLA C. ALBRIGHT,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court
for the District of Montana.

Filed

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UNITED STATES OF AMERICA,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of the Solicitors of Record.

Hon. JAMES C. McREYNOLDS, Attorney General of the United States, of Washington, D. C.,
and

Hon. BURTON K. WHEELER, United States Attorney for the District of Montana, of Butte, Montana,

Solicitors for Plaintiff and Appellant.

Messrs. COOPER & STEPHENSON, of Great Falls, Montana,

Solicitors for Defendants and Appellees.

*In the District Court of the United States in and for
the District of Montana.*

IN EQUITY—No. 1091.

UNITED STATES OF AMERICA,

Complainant,

vs.

JENNIE PETERSON (Formerly JENNIE BEN-
EDICT, WILLIAM H. ALBRIGHT, and
VILLA C. ALBRIGHT,

Defendants.

BE IT REMEMBERED, that on December 9th,
1911, the complainant filed its bill of complaint
herein in the words and figures following, to wit:
[1*]

*Page number appearing at foot of page of original certified Record.

*In the Circuit Court of the United States, Ninth
Circuit, in and for the District of Montana.*

UNITED STATES OF AMERICA,

Complainant,

vs.

JENNIE PETERSON (Formerly JENNIE BEN-
EDICT, WILLIAM H. ALBRIGHT, and
VILLA C. ALBRIGHT,

Defendants.

Bill of Complaint.

To the Circuit Court of the United States, Ninth
Circuit, for the District of Montana, and to the
Honorable the Judges Thereof:

The United States, by Geo. W. Wickersham, At-
torney General of the United States, and James W.
Freeman, United States Attorney for the District of
Montana, brings this bill of complaint against Jen-
nie Peterson (formerly Jennie Benedict), William
H. Albright and Villa C. Albright, all of whom are
residents of the State of Montana, the defendants
herein, and thereupon your orator complains and
says:

FIRST.

That on and prior to the 19th day of July, A. D.
1901, your orator was the owner in fee simple of
those certain mineral lands situated in the State and
District of Montana, and within the Helena land dis-
trict, of which the land office is at Helena, Montana,
and now within the Great Falls land district, of
which the land office is at Great Falls, Montana, a

more particular description of said mineral lands is as follows, to wit: The southeast quarter of the southwest [2] quarter and the southwest quarter of the southeast quarter of section twenty-six, and the west half of the northeast quarter of section thirty-five, township seventeen north of range six east of Montana principal meridian, comprising an area of one hundred and sixty acres.

SECOND.

That at some time prior to the 11th day of July, A. D. 1901, but at what precise time cannot now be stated, the said defendant Jennie Peterson, then named and known as Jennie Benedict, and the said defendant William H. Albright entered into an agreement whereby the said defendant Jennie Peterson, then named and known as Jennie Benedict, in the State and District of Montana, was to enter the above-described lands under and by virtue of the provisions of section 2289 of the Revised Statutes of the United States, for the use and benefit of the said defendant William H. Albright, and that the said lands should be conveyed to the said defendant William H. Albright, by the said defendant Jennie Peterson, then named and known as Jennie Benedict, as soon as possible after final proof was made, the fees upon said entry and the purchase money paid, and the receiver's final receipt for the said lands issued; that the said defendant William H. Albright was to furnish all moneys necessary to pay all fees, the purchase price of said lands, and place all improvements upon said lands necessary to obtain a United States patent therefor; the exact terms

of which said agreement are at this time to your orator unknown; and which said agreement as the defendants Jennie Peterson, then named and known as Jennie Benedict, and William Albright, [3] and each of them, then and there well knew could only be carried out and accomplished by procuring and making and filing in the United States land office false and fraudulent statements in writing and under oath and false and fraudulent proofs to be reduced to writing and sworn to by the said defendant Jennie Peterson, then named and known as Jennie Benedict, and her final proof witnesses; and the said defendant Jennie Peterson, then named and known as Jennie Benedict, and William H. Albright, and each of them, then and there well knew that said lands so to be entered by the said defendant Jennie Peterson, then named and known as Jennie Benedict, were not subject to entry under the provisions of section 2289 of the Revised Statutes of the United States, and could only be acquired under the mineral laws of the United States.

THIRD.

That the said defendant Jennie Peterson, then named and known as Jennie Benedict, in pursuance of said unlawful agreement hereinbefore set forth, on the 19th day of July, A. D. 1901, under and by virtue of the provisions of section 2289 of the Revised Statutes of the United States, filed in the land office of the United States at Helena, Montana, her application No. 12,466 to enter as a homestead the following described lands, to wit: The southeast quarter of the southwest quarter, the west half of the

southeast quarter and the northeast quarter of the southeast quarter of section twenty-six, township seventeen north of range six east of Montana principal meridian; and thereafter the said defendant Jennie Peterson, then named and known as Jennie Benedict, amended her said homestead application so as to embrace and include [4] the following described lands, to wit: The southeast quarter of the southwest quarter, and the southwest quarter of the southeast quarter of section twenty-six, and the west half of the northeast quarter of section thirty-five, township seventeen north of range six east of Montana principal meridian, and filed the same in the land office of the United States at Helena, in the State and District of Montana, to enter said lands as a homestead in said amended application described. That thereafter the said amended application was approved and allowed by the register and receiver of the United States land office at Helena, Montana, so as to embrace the lands last above described.

FOURTH.

And your orator further alleges and charges that the lands hereinbefore described and each and every subdivision thereof, and which were included within the entry as amended of the said defendant Jennie Peterson, then named and known as Jennie Benedict, were mineral in character. That the said lands contained valuable mineral deposits, to wit, gypsum, and fluxing lime rock. That the said defendant Jennie Peterson, then named and known as Jennie Benedict, entered said lands with full knowledge of mineral character of the same, and with full

knowledge that the said lands were not subject to entry under section 2289 of the Revised Statutes of the United States, and could only be acquired under and by virtue of the mineral laws of the United States, and that the said defendant Jennie Peterson, then named and known as Jennie Benedict, entered said lands for the purpose of fraudulently obtaining title to said lands from your orator; all of which the said defendant William H. Albright then and there [5] well knew.

FIFTH.

That at the time of the filing by the said defendant Jennie Peterson, then named and known as Jennie Benedict, of her said homestead application No. 12,466 to enter the lands in this complaint first described and contemporaneously therewith she likewise filed in said land office of the United States at Helena, Montana, as required by law, her homestead affidavit and statement in writing under oath, duly subscribed and sworn to before W. M. Cockrell, United States Commissioner for the District of Montana, in which, among other matters and things, she said and deposed that her said application to enter said lands as a homestead was honestly and in good faith made for the purpose of actual settlement upon and cultivation of said lands and not for the benefit of any other person, and that she would faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence and cultivation necessary to acquire title to said lands so applied for, and that she did not apply to enter said lands for the purpose of speculation, but in good

faith to make a home for herself. That she had not directly or indirectly made and would not make any agreement or contract in any way or manner with any person or persons by which the title she might acquire from the Government of the United States would inure in whole or in part to any person except himself; and at the same time the said defendant Jennie Peterson, then named and known as Jennie Benedict, filed in said land office at Helena, Montana, a nonmineral affidavit and statement in writing under oath duly subscribed and sworn to before the said W. M. Cockrell, United States Commissioner [6] as aforesaid, in which said affidavit the said defendant Jennie Peterson, then named and known as Jennie Benedict, among other matters and things, stated that she was well acquainted with the character of said lands and each subdivision thereof, and that her present knowledge of said lands was such as to enable her to testify understandingly with regard thereto; that there was not to her knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, or any deposits of coal; that there was not to her knowledge any placer, cement, gravel or other valuable mineral deposit; when in truth and in fact, as the said defendant Jennie Peterson, then named and known as Jennie Benedict, at the time of so filing her said application No. 12,466 and the making, signing, subscribing and swearing to her said affidavits as aforesaid, then and there well knew, and the said defendant William H. Albright then and there well knew that the said application

to enter said lands by said defendant Jennie Peterson, then named and known as Jennie Benedict, was not honestly and in good faith made for the purpose of actual settlement, residence and cultivation and was made for the benefit of the said defendant William H. Albright and not for the purpose of complying with all the requirements of the law as to settlement, residence and cultivation necessary to acquire title to said lands so applied for; that she did apply to enter said lands for the purpose of speculation and not in good faith for the purpose of making a home for herself; that she had directly made an agreement or contract with a person, to wit, the defendant William H. Albright, by which the title she might acquire from the Government of the [7] United States should inure to the benefit of the defendant William H. Albright; and that the said lands were not nonmineral in character as the said defendant Jennie Peterson, then named and known as Jennie Benedict, and as the said defendant William H. Albright then and there well knew, and that the said lands were not subject to entry under section 2289 of the Revised Statutes of the United States, and that the statements contained in said homestead affidavit of the said Jennie Peterson, then named and known as Jennie Benedict, and the statements contained in said nonmineral affidavit of the said defendant Jennie Peterson, then named and known as Jennie Benedict, were false and fraudulent and untrue as hereinbefore set forth, and the same were made and filed for the false and fraudulent purpose of imposing upon and deceiv-

ing the register and receiver of the said United States land office at Helena, Montana, and to cause and induce the officers of your orator to believe the statements contained in said affidavits were true; and that the said defendant, Jennie Peterson, then named and known as Jennie Benedict, intended to make settlement upon said lands and reside thereon and to cultivate the same in good faith and to comply with all the requirements of law as to settlement, residence and cultivation, and that she had not in any manner contracted or agreed with any person, persons or corporation by which the title she might acquire from the Government of the United States should inure in whole or in part; that she did not apply to enter said lands for the purpose of speculation, but in good faith to make a home for herself and for the false and fraudulent purpose of imposing upon and deceiving [8] the officers of your orator to believe that the statements contained in said nonmineral affidavit were true, and that the said lands so entered by the said defendant Jennie Peterson, then named and known as Jennie Benedict, were nonmineral in character, and for the false and fraudulent purpose of inducing said officers, and by means of the fraud and deceit hereinbefore specifically set forth to accept said homestead application and affidavits and file the same, and to accept the filing fee for said entry and to issue their receipt and certificate for the same. That at the time of the filing of the said homestead application and affidavits as aforesaid, the said register and receiver were paid the sum of sixteen dollars, the same

being the proper legal fee then and there due and payable to the said receiver upon the filing of said homestead application, and the said register and receiver of the United States land office, relying upon and believing the statements contained in said homestead application to be true, and that the said Jennie Peterson, then named and known as Jennie Benedict, intended to make settlement upon said lands, reside thereon and cultivate the same in good faith and comply with all the requirements of the law as to settlement, residence and cultivation, and that she had not in any manner contracted or agreed with any person, persons or corporation by which the title she might acquire from the Government of the United States would inure in whole or in part to any person or persons except *himself*. That she did not apply to enter said lands for the purpose of speculation, but in good faith to make a home for herself, and relying upon and believing the statements contained in said nonmineral affidavit and believing that the said lands so entered by the said defendant [9] Jennie Peterson, then named and known as Jennie Benedict, were nonmineral in character and were subject to entry under section 2289 of the Revised Statutes of the United States, then and there issued in the name of the said defendant Jennie Peterson, then named and known as Jennie Benedict, their receipt and certificate for such payment and attached thereto and connected with said receipt was and is a notation setting forth in detail the requirements of the law to be observed and complied with by the said defendant Jennie Peterson,

then named and known as Jennie Benedict, in order to obtain title to said lands so applied for by her as aforesaid, and to be noted by her as follows, to wit:

“Note.—It is required of the homestead settler that he shall reside upon and cultivate the lands embraced in his homestead entry for the period of five years from the time of filing the affidavit, being also the date of entry. An abandonment of the land for more than six months works a forfeiture of the claim. Further, within two years from the expiration of the said five years, he must file proof of his actual settlement and cultivation, failing to do which his entry will be canceled. If the settler does not wish to remain five years on his tract he can, at any time after fourteen months, pay for it with cash or land warrants upon making proof of settlement and of residence and cultivation from date of filing affidavit to the time of payment.”

SIXTH.

That your orator is informed and believes and therefore charges that the said money so paid as aforesaid was not the money of the defendant Jennie Peterson, then named and known as Jennie Benedict, who entered said lands, but on the [10] contrary that the same, as well as the personal expenses of the said defendant Jennie Peterson, then named and known as Jennie Benedict, in making said entry, was furnished and paid directly by or through the agents of the said defendant William H. Albright, in pursuance of said unlawful agreement hereinbefore set forth and referred to.

SEVENTH.

That in order to entitle the said defendant Jennie Peterson, then named and known as Jennie Benedict, to obtain and procure from the said United States a patent for the said tract of land in this complaint first described, under the homestead laws of the United States, it was incumbent upon her and she was required to make actual settlement upon said lands and reside thereon and cultivate the same for a period of five years from and after the filing of her said application and the affidavits hereinbefore set forth in the proper United States land office, or in the event she did not desire to remain upon said lands for the full period of five years to make payment for said lands at any time after the expiration of fourteen calendar months from and after the filing of said homestead application and affidavits, as aforesaid, at the rate of one dollar and fifty cents per acre, and make proper and satisfactory proof before the register and receiver of the proper land office of the United States of settlement and residence and cultivation of said lands from the date of filing of said homestead application and affidavit for a period of fourteen months and to the time of making such final proof and payment.

EIGHTH.

That for the purpose of availing herself of the privileges [11] afforded by section 2301 of the Revised Statutes of the United States and the acts amendatory thereof and supplemental thereto, and after the expiration of fourteen calendar months from and after the filing by her of said homestead application

and affidavits aforesaid, on or about the fifth day of August, 1905, the said defendant Jennie Peterson, then named and known as Jennie Benedict, appeared before C. H. Benton, receiver of the United States land office at Great Falls, Montana, said land office then and there being the proper United States land office of the land district wherein said lands were situated, with her final proof witnesses, Gust Benson and John Quick, and offered final proof before the said C. H. Benton, receiver of the said United States land office, as aforesaid, that she had settled upon said lands and premises and resided thereon and cultivated the same as required by law and within the meaning and intent of the homestead laws of the said United States, and then and there gave, made out, and signed her deposition and swore to the same before the said C. H. Benton, receiver of the said United States land office as aforesaid, and on the same date filed and caused to be filed the said deposition in the said United States land office at Great Falls, Montana, and then and there delivered and caused to be delivered and presented the said deposition so made, signed and sworn to by her, the said defendant Jennie Peterson, then named and known as Jennie Benedict, to the said register and receiver of the said United States land office as proof of the settlement, residence and cultivation of said lands, and the same was accepted by the said register and receiver of the said United States land office. That on the said date the said defendant [12] Jennie Peterson, then named and known as Jennie Benedict, then and there signed her non-

mineral affidavit and swore to the same before the said C. H. Benton, receiver of the said United States land office as aforesaid, to the effect that she was well acquainted with the character of said lands and each and every subdivision thereof; that her personal knowledge of said lands was such as to enable her to testify understandingly with regard thereto; that there was not to her knowledge within the limits thereof any vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposits of coal, and that there was not within the limits of said lands to her knowledge any placer, cement, gravel or other valuable mineral deposits, and on said date filed and caused to be filed the said nonmineral affidavit in said land office as aforesaid, and then and there delivered and caused to be delivered and presented said affidavit so made, signed and sworn to by her, the said defendant Jennie Peterson, then named and known as Jennie Benedict, to the said register and receiver of the said land office aforesaid, and the said affidavit was accepted by said register and receiver of said land office.

NINTH.

That the said defendant Jennie Peterson, then named and known as Jennie Benedict, in her said deposition signed and sworn to by her as aforesaid, and delivered and presented to the said register and receiver and accepted by them as true of the settlement, residence and the cultivation of said lands, among other matters and things, testified and deposed that she had established her residence upon

said lands in October, 1901; that she began living on said lands in September, [13] 1901, and that she had placed improvements upon said lands consisting of a house thirteen feet by sixteen feet and had constructed upon said lands a barn twelve feet by fourteen feet and constructed one mile of five-wire fence upon said lands, all at a cost of at least six hundred dollars. That she had resided upon said lands continuously from September, 1901, except for a temporary absence of between five and six months in 1902, and an absence of about three months in the year 1903. That for the eight months immediately preceding the submission of said final proof she had been residing on said lands continuously. That she had not been absent from said lands six months any year since she filed on said lands. That she had cultivated fourteen acres of said lands and had raised crops three years on ten acres of the same; that she did not think there were any indication of coal, salines or minerals of any character on said lands. That the said defendant Jennie Peterson, then named and known as Jennie Benedict, procured from each of her said final proof witnesses, Gust Benson and John Quick, a like deposition taken before the said C. H. Benson, receiver of the said United States land office, at Great Falls, Montana, and signed and sworn to by said witnesses before said receiver of said land office, to the same effect and corroborative and in aid of the said deposition of the said defendant Jennie Peterson, then named and known as Jennie Benedict, and filed the same, together with the said defendant Jennie Peter-

son's (then named and known as Jennie Benedict) own deposition in the said United States land office at Great Falls, Montana, and presented the same to the said register and receiver of the said land office as final proof [14] of the settlement, residence upon and cultivation of said lands by her as required by law, and all of which said depositions and sworn statements of the said defendant Jennie Peterson, then named and known as Jennie Benedict, and her said final proof witnesses, were then and there accepted by said register and receiver of the said United States land office as proof of settlement and residence upon and cultivation of said lands by the said defendant Jennie Peterson, then named and known as Jennie Benedict. That thereupon the said receiver of the said United States land office was paid the sum of two hundred dollars, being the final payment for said lands at the rate of one dollar and twenty-five cents per acre.

TENTH.

That your orator is informed and believes and therefore charges that none of the purchase money paid for said lands at said land office was the money of the said defendant Jennie Peterson, then named and known as Jennie Benedict, who entered said lands, but, on the contrary, that the same, as well as all moneys paid for the said land office fees in connection with the said entry, as well as the personal expenses of the said defendant Jennie Peterson, then named and known as Jennie Benedict, and her final proof witnesses, as well as all improvements placed upon said lands, were furnished and

paid directly by or through the agents of the said defendant William H. Albright, in pursuance of said unlawful agreement hereinbefore set forth, and for which said two hundred dollars the said receiver of the said United States land office then and there issued in the name of the said defendant Jennie Peterson, then named and known as Jennie [15] Benedict, her final receipt No. 765, and the register of the said land office likewise then and there issued in the name of the said defendant Jennie Peterson, then named and known as Jennie Benedict, her final certificate No. 765 for the said lands, certifying that in pursuance of law the said defendant Jennie Peterson, then named and known as Jennie Benedict, had purchased said lands and that upon presentation of said certificate to the Commissioner of the General Land Office the said defendant, Jennie Peterson, then named and known as Jennie Benedict, in whose favor said certificate was issued, would be entitled to receive a patent for said lands. That thereafter the officers of your orator relying upon and believing the statements contained in the said defendant Jennie Peterson's (then named and known as Jennie Benedict) homestead application and affidavits aforesaid, and that the said defendant Jennie Peterson, then named and known as Jennie Benedict, intended to make settlement upon said lands, reside thereon and cultivate the same in good faith, and comply with all the requirements of the law as to settlement, residence and cultivation of said lands, and that she had not in any manner contracted or agreed with any

person or persons or corporation by which the title she might acquire from the Government of the United States would inure in whole or in part to any other person or persons except himself; that she did not apply to enter said lands for the purpose of speculation, but in good faith to make a home for herself, and believing that the said lands were nonmineral in character and were subject to entry under the homestead laws of the United States as hereinbefore referred to and mentioned, by means of which the said register and receiver of the said United States land office issued a [16] first receipt and certificate, and relying upon and believing the statements contained in said depositions of the said defendant Jennie Peterson, then named and known as Jennie Benedict, and her final proof witnesses and believing that the said defendant Jennie Peterson, then named and known as Jennie Benedict, had made settlement and residence upon and cultivated said lands and had complied with the provisions of the acts of Congress hereinbefore referred to, and believing the matters contained in the nonmineral affidavits filed by said defendant Jennie Peterson, then named and known as Jennie Benedict, at the time of filing of her final proof, and the issuance by the said register and receiver of their final receipt and certificate, such proceedings were had that on the 30th day of December, 1905, a patent was issued and delivered by the said United States to the said defendant Jennie Peterson, then named and known as Jennie Benedict, that the acceptance of said depositions and testimony

of said defendant Jennie Peterson, then named and known as Jennie Benedict, and her final proof witnesses, Gust Benson and John Quick, as final proof of the settlement, residence upon said lands and the cultivation of the same by said entry-woman, as required by law, by the said register and receiver, and the issuance of the final receipt by the said receiver, and the issuance of said final certificate of purchase by the said register as aforesaid, as hereinbefore mentioned and set forth, and the issuance of said patent for said lands to the said defendant Jennie Peterson, then named and known as Jennie Benedict, were had and done by the said officers of said land office and the officers of your orator, the United States of America, in reliance by them, and each of [17] them, upon the truth of said testimony and statements contained in said depositions of the said defendant Jennie Peterson, then named and known as Jennie Benedict, and her final proof witnesses, Gust Benson and John Quick, and in reliance upon the good faith of the said defendant Jennie Peterson, then named and known as Jennie Benedict, and her final proof witnesses, in the premises, and not otherwise.

ELEVENTH.

That the said depositions of the said defendant Jennie Peterson, then named and known as Jennie Benedict, and her final proof witnesses, were, and each of them was, then and there false and fraudulent, as they then and there well knew, and the same were made and filed with the intent to deceive the officers of the United States and to fraudulently

obtain a patent for the said lands in pursuance of said unlawful agreement existing between said defendants, and by fraud and deceit to procure a United States patent by means of said false and fraudulent statements and testimony made and contained in said depositions in this, to wit: That the said defendant Jennie Peterson, then named and known as Jennie Benedict, had not and did not establish a residence upon said lands, or any part or portion thereof, during the month of October, 1901, or at any other time, or at all, and that she had not placed improvements upon said lands consisting of a house thirteen feet by sixteen feet and a barn twelve feet by fourteen feet, and that she had not constructed one mile of five-wire fence upon said lands, all at a cost of at least six hundred dollars, and your orator alleges the fact to be that the value of the improvements upon said lands was less than three hundred dollars, and no greater sum was expended [18] by her, or anyone else, in placing improvements upon said entry; that the said defendant Jennie Peterson, then named and known as Jennie Benedict, had not resided upon said lands continuously from September, 1901, except for a temporary absence of between five and six months in 1902 and an absence of about three months in the year 1903, or at any other time, or in any other manner, or at all. That she had not been residing upon said lands, or any part or portion thereof, continuously for eight months immediately before the submission of her said final proof, or at any other time, or at all. That she had been

absent from said lands more than six months each and every year from said month of October, 1901. That she had not cultivated fourteen acres of said lands and had not raised crops three years on ten acres of the same; and your orator alleges the fact to be that no greater amount than five acres of said lands was ever cultivated either by said defendant Jennie Peterson, then named and known as Jennie Benedict, or anyone else prior to the making of said final proof. And your orator alleges the fact to be that the said defendant Jennie Peterson, then named and known as Jennie Benedict, never made settlement upon said lands, or any part or portion thereof, and did not establish residence and reside upon said lands, or any part or portion thereof, and had never cultivated any part or portion thereof in excess of five acres as hereinbefore set forth; and that she had no improvements thereon except a small claim shack of the value of one hundred dollars and a board shed of the value of fifty dollars. And your orator alleges the fact to be that each and all of said statements so made by the said defendant Jennie Peterson, then named and [19] known as Jennie Benedict, and her said final proof witnesses, as hereinbefore specifically mentioned and set forth, and which are contained in said affidavits, depositions and testimony as proof of settlement, residence upon and cultivation of said lands and as to the nonmineral character of the same, are utterly false and fraudulent and untrue, as the said defendants, Jennie Peterson, then named and known as Jennie Benedict, and William H.

Albright, and each of them, then and there well knew. And your orator is informed and believes and alleges the fact to be that all moneys expended in placing improvements upon and in cultivating said lands were expended by the said defendant William H. Albright for his own use and benefit and were had and done in pursuance of said unlawful agreement existing between said defendants, as hereinbefore set forth.

TWELFTH.

That the said testimony of the said Jennie Peterson, then named and known as Jennie Benedict, and of her said final proof witnesses, were false and fraudulent in every particular, as hereinbefore set forth, and the same were made and filed and offered as proof of settlement and residence upon and cultivation of said lands as aforesaid, and as proof of the nonmineral character of the said lands for the false and fraudulent purpose of imposing upon and deceiving the register and receiver of the said United States land office at Great Falls, Montana, and to cause and induce the said officers of your orator to believe that the statements and testimony contained in said depositions were true; that the said defendant Jennie Peterson, then named and known as Jennie Benedict, had in fact established settlement and residence [20] and had resided upon said lands and had cultivated the same as required by law, and that the said lands were nonmineral in character, for the purpose of obtaining and procuring, by means of said fraud and deceit, the issuance to the said defendant Jennie

Peterson, then named and known as Jennie Benedict, a United States patent for the said lands, in accordance with the terms of said unlawful agreement existing between said defendants, as hereinbefore set forth. That the said defendants William H. Albright and Jennie Peterson, then named and known as Jennie Benedict, by means of said false and fraudulent depositions and false and fraudulent statements and testimony therein contained, imposed upon and deceived the officers of the said United States and caused and induced the said officers to believe that the statements and testimony contained in said affidavits and depositions were true and that the said defendant Jennie Peterson, then named and known as Jennie Benedict, had in fact resided upon said lands and had cultivated the same as required by law, and that the said lands were nonmineral in character, and your orator alleges that the said officers of the United States, supposing and believing the statements and testimony contained in said affidavits and depositions to be true and relying upon the truth of said statements and testimony so falsely and fraudulently made and given by the said defendant Jennie Peterson, then named and known as Jennie Benedict, and her final proof witnesses, and believing from said affidavits and depositions and the statements and testimony therein contained that she had made settlement and had resided upon and cultivated said lands according to law, and that the said lands were nonmineral in character, were wholly deceived and imposed [21] upon and misled into allowing said final proof

and permitting the issuance of said final receipt and the issuance of said final certificate of purchase of said lands, and the issuance by the said United States of a patent for said lands to the said defendant Jennie Peterson, then named and known as Jennie Benedict.

THIRTEENTH.

Your orator is informed and believes and therefore alleges that after the issuance of said final receipt and certificate and the said patent for the said lands to the said defendant Jennie Peterson, then named and known as Jennie Benedict, the said defendant Jennie Peterson, then named and known as Jennie Benedict, advised the said defendant William H. Albright that she was ready and willing to convey said lands to him in accordance with the terms of said unlawful agreement hereinbefore set forth; that the said defendant William H. Albright, with intent and design to further deceive your orator, to wit, on August 28, 1905, caused the said defendant Jennie Peterson, then named and known as Jennie Benedict, to convey said lands by deed to the defendant Villa C. Albright, wife of the defendant William H. Albright; and your orator further alleges that said conveyance to the said defendant Villa C. Albright was without consideration moving from the said Villa C. Albright to the said defendant Jennie Peterson, then named and known as Jennie Benedict; but your orator alleges on information and belief that the money then paid to the said defendant Jennie Peterson, then named and known as Jennie Benedict, for said land, was the

money and property of the said defendant William H. Albright, and paid pursuant to said illegal agreement aforesaid, [22] and that said title has since last mentioned date, and now is, held by the said defendant Villa C. Albright as trustee for said defendant William H. Albright, and for the purpose of imposing upon and deceiving your orator so as to make it appear that the said Villa C. Albright was and is an innocent purchaser for value, and without notice of the fraud so practiced upon your orator as aforesaid; but your orator alleges that whatever right, title or interest the said defendant Villa C. Albright acquired in or to said lands the same was acquired with full knowledge of the fraud so practiced upon your orator as aforesaid, and that said purchase or pretended purchase is void and should be so in equity decreed in favor of the United States; and any purchase or pretended purchase, or incumbrance or lien or pretended incumbrance or apparent lien so alleged to exist at law or in equity upon said lands, or any part or portion thereof, in favor of the said defendant Villa C. Albright should be voided by a decree of this court.

FOURTEENTH.

And your orator further sheweth unto your honors, that the said defendants William H. Albright and Villa C. Albright are now in the occupancy, possession and enjoyment of the said lands and premises, and that the said defendants William H. Albright and Villa C. Albright claim some right, title or interest in and to said lands; but your orator alleges that by whatever pretended right or title the

said William H. Albright and Villa C. Albright now hold possession of or occupy the said lands, the same is wholly void and ineffectual as against the rights of your orator. That the existence of said patent so fraudulently obtained and procured [23] by the said defendant Jennie Peterson, then named and known as Jennie Benedict, as hereinbefore set forth, on its face entitles the said Jennie Peterson (formerly Jennie Benedict), and those claiming under her to exercise the right of absolute ownership on and over said lands, and to assert a legal title to the same, to which the defendants are not entitled; that if said patent remains uncanceled and in force, the same may be used in fraud of your orator and all persons relying thereon as a valid and substantial conveyance of the legal title to the said lands and premises.

FIFTEENTH.

And your orator further charges that it appears that the said defendants Villa C. Albright and William H. Albright claim to have purchased in good faith and for a valuable consideration said lands; but, nevertheless, your orator avers and charges that the said defendants purchased or acquired said rights with notice of the fraud so as aforesaid perpetrated upon your orator, and that such purchase or the acquisition of such right should be so in equity decreed in favor of the United States, and any purchase or pretended purchase, or incumbrance or lien, or pretended incumbrance or apparent lien, alleged to exist at law or in equity thereon upon said lands, or any part or portion thereof, should be voided by

decree of this Honorable Court.

THEREFORE, THE PREMISES CONSIDERED, complainant prays: That for as much as complainant is without full and adequate remedy in the premises, save in a court of equity, to the end that the defendants may make full, true and direct answer to all and singular the matters and things herein set forth as fully as if they had been fully interrogated [24] thereunder, but not under oath (an answer under oath being hereby expressly waived), and to the end that the said patent may be declared null and void and be set aside, revoked and held for naught, and be delivered up to complainant and surrendered for cancellation and that the said defendants, Jennie Peterson (formerly Jennie Benedict), William H. Albright and Villa C. Albright be forever and perpetually restrained and enjoined from setting up, asserting or claiming any rights, privileges, or advantages under said patent, and that said instrument or instruments, by virtue of which the two last named defendants claim any right, title or interest in or to any part of said lands in this bill of complaint first described, that the same be declared null and void and of no force and effect, and that all and singular of said lands may be adjudged and decreed to be the perfect property of the complainant full and clear of all claims of any of said defendants. That said defendants during the progress of this cause, and thereafter, finally and perpetually may be enjoined from setting up any claim to the said lands or any part thereof, and from creating any cloud upon complainant's title to the

same, or any part thereof, and that the possession thereof may be restored to the complainant.

May it please your Honors to grant unto your orator a writ of subpoena of the United States of America, issued out of and under the seal of this court, directed to the said defendants Jennie Peterson (formerly Jennie Benedict), William H. Albright and Villa C. Albright, commanding them on a day certain to appear and answer unto this bill of complaint, and to abide and perform such orders and decree in the premises as the Court shall deem proper and required by [25] the principles of equity and good conscience.

And complainant prays for such other and further relief as to your Honors shall seem proper and shall seem meet and agreeable to equity.

GEO. W. WICKERSHAM,

Attorney General of the United States.

JAS. W. FREEMAN,

United States Attorney, District of Montana. [26]

United States of America,

District of Montana,—ss.

James W. Freeman, being first duly sworn, deposes and says: That he is the regularly appointed, qualified and acting United States Attorney for the district of Montana; that he has read the foregoing bill of complaint and knows the contents thereof, and that the matters and facts therein stated and alleged are true to the best of his knowledge, information and belief.

JAS. W. FREEMAN.

Subscribed and sworn to before me this 7th day of December, 1911.

S. C. FORD,
Notary Public in and for the State of Montana, Residing at Helena, Montana.

My commission expires September 7, 1912.

[Indorsed]: Filed Dec. 9, 1911. Geo. W. Sproule, Clerk. [27]

Thereafter, on December 9, 1911, a subpoena in equity was duly issued herein, in the words and figures following, to wit:

[Subpoena.]

Circuit Court of the United States, Ninth Judicial Circuit, District of Montana.

IN EQUITY.

The President of the United States of America,
Greeting: To Jennie Peterson (Formerly Jennie Benedict), William H. Albright and Villa C. Albright, Defendants.

You are hereby commanded that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in Federal Building, Helena, Montana, on the 1st day of January, A. D. 1912, to answer to a bill of complaint exhibited against you in said court by the United States of America, complainant, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of Five Thousand Dollars.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 9th day of December, in the year of our Lord one thousand nine hundred and eleven and of our Independence the 136th.

[Seal]

GEO. W. SPROULE,
Clerk.

MEMORANDUM PURSUANT TO RULE 12,
SUPREME COURT U. S.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of January next, at the Clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken *pro confesso*.

[Seal]

GEO. W. SPROULE,
Clerk.

GEO. W. WICKERSHAM,

U. S. Atty. Genl.,

J. W. FREEMAN,

U. S. Atty., Helena, Montana,

Solicitors for Complainant. [28]

United States Marshal's Office,
District of Montana.

I hereby certify that I received the within writ on the 11th day of December, 1911, and personally served the same on the 12 and 13 days of December, 1911, by delivering to and leaving with William H. Albright and Villa C. Albright, at Great Falls, Cascade County, December 12th, 1911, Jennie Peterson, 4 miles west of Logging Creek, Cascade County, December 13th, 1911, said defendants named therein

personally at places stated in the county of Cascade in said District, a copy thereof.

Dated Dec. 14, 1911.

WILLIAM LINDSAY,
U. S. Marshal.
By Charles Morgan,
Deputy.

[Indorsed]: Title of Court and Cause. Subpoena in Equity. Filed Dec. 16, 1911. Geo. W. Sproule, Clerk. [29]

Thereafter, on February 5th, 1912, Answer was duly filed herein in the words and figures following, to wit: [30]

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

UNITED STATES OF AMERICA,
Complainant,

vs.

JENNIE PETERSON (Formerly JENNIE
BENEDICT), WILLIAM H. ALBRIGHT
and VILLA C. ALBRIGHT,
Defendants.

Answer.

Now come the above-named defendants, William H. Albright and Villa C. Albright, and, for their joint and several answer to the Bill of Complaint of the complainant herein, the United States of America, allege as follows:

I.

They ADMIT that on and prior to the 19th day of July, 1901, complainant was the owner in fee of those certain lands situated in the State and District of Montana, and within the Helena Land District of which the land office is at Helena, Montana, and that the same now are within the Great Falls Land District of which the land office is at Great Falls, Montana, and that a particular description of said lands is the southwest quarter of the southwest quarter, and the southwest quarter of the southeast quarter of section twenty-six; and the west half of the northeast quarter of section thirty-five, township seventeen [31] north of range six east of Montana principal meridian, comprising an area of one hundred sixty acres. But answering defendants DENY that said lands were on the 19th day of July, 1901, or at any other time, or that they now are mineral lands or valuable for mineral, and they allege the fact to be that the agents of complainant long prior to the date aforesaid, in accordance with their duty under the law in such case made and provided, duly examined such lands and classified the same as nonmineral in character, as in truth and fact such lands were and are.

II.

Answering defendants DENY that at some time prior to the 11th day of July, 1901, or at any other time, or ever at all the said defendant Jennie Peterson, then known as Jennie Benedict, entered into an agreement with the answering defendant William H. Albright whereby said Jennie Peterson,

known as Jennie Benedict, was to enter the above-described lands under and by virtue of the provisions of section 2289 of the Revised Statutes of the United States for the use and benefit of the defendant William H. Albright, and that the said lands should be conveyed to the defendant William H. Albright by said defendant Jennie Peterson, then known as Jennie Benedict, as soon as possible after final proof was made and the receiver's final receipt for the said lands issued; and DENY that the defendant William H. Albright entered into any such agreement or entered into any agreement with the defendant Jennie Peterson, then known as Jennie Benedict, whatever with respect to said lands. Answering defendants DENY that the said defendant William H. Albright was to [32] furnish all or any of the moneys necessary to pay all or any of the fees for the purchase of said lands, or for the improvements thereon necessary to obtain title thereto, or any agreements whatever of the tenor and effect alleged in complainant's bill of complaint, or any agreement whatever in respect to said lands, prior to the time when said Jennie Peterson, then known as Jennie Benedict, obtained title to said lands from the complainant. And these answering defendants DENY that, if the said Jennie Peterson, then known as Jennie Benedict, perpetrated any fraud in or about the purchase or acquiring of the title to any of the lands mentioned in complainant's bill of complaint, either of the answering defendants had any knowledge or notice of such fraudulent purpose or acts of the said defendant Jennie Peterson, then known as Jennie

Benedict. And the answering defendants further DENY that they or either of them ever had or now have any knowledge of the alleged mineral character of said lands, and allege the fact to be that they always believed and now believe that said lands were not mineral in character; that they are not underlaid with gypsum and do not contain any valuable mineral deposit, but that said lands always were and still are more valuable for agricultural purposes than for mineral purposes; and they DENY that said lands were of such character as would have enabled them to be disposed of under the laws of the United States as mineral lands.

III.

Further answering these answering defendants ADMIT that on the 19th day of July, 1901, or thereabouts, said [33] Jennie Peterson, then known as Jennie Benedict, made her homestead application to enter as a homestead the southeast quarter of the southwest quarter, the west half of the southeast quarter, and the northeast quarter of the southeast quarter of section twenty-six, township seventeen north of range six east of Montana principal meridian; and that she thereafter amended her said homestead application so as to embrace and include the southeast quarter of the southwest quarter and the southwest quarter of the southeast quarter of section twenty-six, and the west half of the northeast quarter of section thirty-five township seventeen north of range six east of Montana principal meridian, and that she filed such applica-

tion in the United States land office at Helena, Montana to enter said lands as a Homestead in said amended application.

Answering defendants further ADMIT on their information and belief that said amended application was approved.

IV.

Answering defendants further DENY that said lands, or any part thereof were mineral in character, or that they contained valuable deposits or any deposits of gypsum or fluxing lime rock or any other mineral deposit. They DENY that the defendant Jennie Peterson, then known as Jennie Benedict, entered said lands with full or any knowledge of its alleged mineral character. And DENY that she entered said lands for the purpose of fraudulently obtaining the title to said lands or to any part thereof, and they DENY that the said defendant William H. Albright, then or there, or at any other time had or now has any [34] knowledge of any alleged or any fraudulent intent on the part of said Jennie Peterson then known as Jennie Benedict in the premises.

V.

Answering paragraph fifth of complainant's bill of complaint these answering defendants allege that they have no knowledge as to what instruments or affidavits the said Jennie Peterson, then known as Jennie Benedict, filed in the said United States Land Office at Helena, Montana, at the time of filing her said application or as to what officers said affidavits were sworn to before, but that since it is the practice that affidavits of the character named in said para-

graph fifth of complainant's bill of complaint be filed to accompany applications, for homestead entry these answering defendants assume that affidavits, of the nature and character of those mentioned in said paragraph fifth as having been filed, were made and filed as alleged in said paragraph fifth. But these answering defendants DENY each and every other allegation, matter and thing in said paragraph fifth of complainant's bill of complaint alleged and contained.

VI.

Answering paragraph sixth of complainant's bill of complaint, these answering defendants DENY that any of the moneys paid by said Jennie Peterson, then known as Jennie Benedict, in or about the entry of said lands was not the money of the defendant Jennie Peterson, then known as Jennie Benedict. And DENY that said moneys, or the personal expenses of said defendant Jennie Peterson, then known as Jennie Benedict, or any part thereof, in making said entry [35] or for any other purpose in respect to said lands was furnished or paid, directly or indirectly, by the answering defendant William H. Albright, or by or through his agents or otherwise, in pursuance of said alleged unlawful agreement or otherwise, or at all.

VII.

Answering defendants ADMIT the allegations contained in paragraph seventh of complainant's bill of complaint.

VIII.

Answering paragraph eighth of complainant's bill

of complaint these answering defendants allege that they have no knowledge or information with respect to the proceedings had or taken by the said Jennie Peterson, then known as Jennie Benedict, at the time she made her final proof for the purpose of obtaining a patent to said lands, or when said final proof was made, or as to who were her witnesses at the time her said final proof was made; nor have they any knowledge of the matters and things testified to by the said Jennie Peterson, then known as Jennie Benedict, and her said final proof witnesses, and they leave complainant to its proofs in respect to the allegations contained in paragraph eight if complainant deems the allegations of said paragraph material.

IX.

Answering paragraph ninth of complainant's bill of complaint, these answering defendants allege that they have no knowledge or information as to the representations made by the said Jennie Peterson, then known as Jennie Benedict, and her final proof witnesses with respect to the nature and character of the improvements and cultivation of and [36] time of residence upon said lands at the time of making her said final proof, or as to what moneys were paid by the said Jennie Peterson, then known as Jennie Benedict, to the United States for said lands, but assume the fact to be that such proof and payment was in accordance with the laws of the United States in such case made and provided.

X.

Answering paragraph tenth of complainant's bill of complaint these answering defendants DENY

that the purchase money paid for said lands was not the money of the said Jennie Peterson, then known as Jennie Benedict, and DENY that said moneys, as well as the moneys paid for the land office fees in connection with said entry and the personal expenses of the said Jennie Peterson, then known as Jennie Benedict, and the personal expenses of her said final proof witnesses, and the expenses of her improvements, or any part thereof, were furnished or paid, directly or indirectly, by the defendant William H. Albright, or through his agents or otherwise in pursuance of said alleged unlawful agreement, or otherwise. They ADMIT that a final receipt No. 765 was issued to the said Jennie Peterson, then known as Jennie Benedict, and ADMIT that thereafter, on or about the 30th day of December, 1905, a patent was issued to said Jennie Peterson, then known as Jennie Benedict, for said lands, and that the issuance of said final receipt and patent was in reliance upon the truth of the matters and things stated by the said Jennie Peterson, then known as Jennie Benedict, and her final proof witnesses at the time her said final proof was made and accepted. These answering defendants, on their information and belief, DENY that [37] any false or fraudulent statements were made by the said Jennie Peterson, then known as Jennie Benedict, or her said final proof witnesses, in or about said final proof; but further alleges that if any false or fraudulent statements were made by or on behalf of said Jennie Peterson, then known as Jennie Benedict, that these answering defendants

or either of them ever had any knowledge thereof.

XI.

Answering paragraph eleventh of complainant's bill of complaint, these answering defendants DENY that the depositions of said Jennie Peterson, then known as Jennie Benedict, and her final proof witnesses were false or fraudulent, or that they were known to be such, or that they were made and filed pursuant to any fraudulent or other agreement between said Jennie Peterson, then known as Jennie Benedict, and the said defendant William H. Albright. Answering defendant William H. Albright alleges that the said Jennie Peterson, then known as Jennie Benedict, did establish her residence upon the lands aforesaid on or about the month of October, 1901, and that she claimed to be residing thereon from the time of establishing her said residence until after she had made her said final proof, and that she had placed thereon a house about 13x16 feet and a small barn about 12x14 feet, and that she had constructed about one mile of wire fence upon said lands, but as to the cost or value of said improvements this answering defendant William H. Albright has not sufficient knowledge to enable him to form a belief. And this answering defendant Villa C. Albright alleges that she has no knowledge in respect to the character or value of the improvements [38] placed by the said Jennie Peterson, then known as Jennie Benedict, upon said lands or in respect to her residence thereon.

XII.

These answering defendants further allege that

at the time said Jennie Peterson, then known as Jennie Benedict, established her residence upon and claimed to reside upon said lands they had no interest in said lands and had no knowledge of the acts and doings of the said Jennie Peterson, then known as Jennie Benedict, with respect thereto that would enable them to know how long the said Jennie Peterson, then known as Jennie Benedict, actually resided upon said lands, but that after said Jennie Peterson, then known as Jennie Benedict, had made her final proof and had obtained title to said lands, answering defendant Villa C. Albright, through her agent defendant William H. Albright, purchased said lands from the said Jennie Peterson, then known as Jennie Benedict, for the sum of EIGHT HUNDRED DOLLARS; which sum was paid out of the moneys of this answering defendant Villa C. Albright, and such payment was made in good faith and without any knowledge on the part of the answering defendant Villa C. Albright of any fraud perpetrated by said Jennie Peterson, then known as Jennie Benedict, upon the United States in or about the entry or purchase of said lands, if any such fraud was perpetrated in fact.

And this answering defendant William H. Albright alleges that he never had any agreement, either in his own behalf or on behalf of his codefendant Villa C. Albright, with the said Jennie Peterson, then known as Jennie Benedict, with respect to said lands prior to the actual purchase [39] thereof at the time the same was conveyed to the defendant Villa C. Albright, and that he never

furnished any money to the said Jennie Peterson, then known as Jennie Benedict, for filing upon said lands or for making proof thereon, or for paying the purchase price thereof, or for any part of the cultivation, or for making any of the improvements that were made thereon, and that he never had any dealings, directly or indirectly with the said Jennie Peterson, then known as Jennie Benedict, with respect to said lands until after she had made her final proof thereon, and acquired her title thereto, and that then she offered to sell the same to this answering defendant William H. Albright for the sum of EIGHT HUNDRED DOLLARS; and, being authorized so to do by his codefendant Villa C. Albright, he purchased said lands for said sum of EIGHT HUNDRED DOLLARS with the moneys of the said defendant Villa C. Albright. That if the said defendant Jennie Peterson, then known as Jennie Benedict, in or about the entry, purchase or her residence upon said lands, or her improvements thereon made any false or fraudulent representations to the officers of complainant or otherwise deceived or defrauded complainant, this answering defendant has no knowledge of any such acts on the part of said defendant Jennie Peterson.

And this answering defendant Villa C. Albright further alleges that she purchased said lands from the said Jennie Peterson, then known as Jennie Benedict, after the latter had acquired title to said lands, and for a good and valuable consideration, to wit: The sum of EIGHT HUNDRED DOLLARS, duly paid by this answering defendant Villa

C. Albright, through her said agent William H. Albright, and without [40] any knowledge or notice of any fraudulent acts of any kind or character perpetrated upon complainant or its officers by the said Jennie Peterson, then known as Jennie Benedict, if in fact such were perpetrated. And this answering defendant, Villa C. Albright, claims title to said lands under such good faith purchase and not otherwise.

And these answering defendants DENY each and every allegation, matter and thing in complainant's bill of complaint contained, not hereinbefore specifically admitted, qualified or DENIED.

WHEREFORE, these answering defendants, having fully answered complainant's bill of complaint, but without oath, because answer under oath was expressly waived, pray that said bill of complaint be dismissed; that complainant take nothing by its said suit; that complainant's said several complaints be found and determined to be of no force or effect as against the answering defendant Villa C. Albright, and that her title to said lands, and the whole thereof be quieted, and that the complainant be decreed to have no right, title or interest therein or thereto, and that she have such other and further relief as she shall be found in equity to be entitled, and that the answering defendants be dismissed hence with their costs and charges in this behalf expended.

WILLIAM H. ALBRIGHT.

VILLA C. ALBRIGHT.

COOPER & STEPHENSON,

Counsel for Defendants William H. and Villa C. Albright.

[Indorsed]: Title of Court and Cause. Answer.
Filed Feb. 5, 1912. Geo. W. Sproule, Clerk. [41]

Thereafter, on Feb. 17, 1912, Replication was duly
filed herein as follows, to wit:

*In the District Court of the United States, in and for
the District of Montana.*

UNITED STATES OF AMERICA,

Complainant,

vs.

JENNIE PETERSON (Formerly JENNIE
BENEDICT), WILLIAM H. ALBRIGHT
and VILLA C. ALBRIGHT,

Defendants.

**Replication to the Joint and Several Answer of the
Defendants William H. Albright and Villa C.
Albright.**

This replicant, saving and reserving to itself all
and all manner of advantage of exception which may
be had and taken to the manifold errors, uncertain-
ties and insufficiencies of the answer of said defend-
ants, and for replication thereunto sayeth that it does
and will ever maintain and prove its said bill to be
true, certain and sufficient in the law to be answered
unto by said defendants, and that the answer of said
defendants is very uncertain, evasive and insufficient
in the law to be replied unto by this replicant; with-
out that that any other matter or thing in the said
answer contained material or effectual in the law to
be replied unto, confessed or avoided, traversed or de-

nied is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly as in and by its said bill it has already prayed.

JAS. W. FREEMAN,

United States Attorney, District of Montana. [42]

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

Complainant,

vs.

JENNIE PETERSON (Formerly JENNIE
BENEDICT), WILLIAM H. ALBRIGHT
and VILLA C. ALBRIGHT,

Defendants.

**Affidavit of Mailing [of Replication to Joint and
Several Answer].**

State of Montana,

County of Lewis and Clark,—ss.

E. Lieberg, being first duly sworn, deposes and says that he is the clerk to the United States Attorney for the District of Montana, residing at Helena, Montana; that the attorneys for the above-named defendants, Cooper & Stephenson, reside at the city of Great Falls, county of Cascade, State of Montana, and that there is a regular communication by mail between the city of Helena and the said city of Great Falls; that on the 17th day of February, A. D. 1912, at about the hour of four-thirty P. M. of said day, affiant deposited in the United States postoffice at the city of Helena, Montana, the original replication to

the joint and several answer of the defendants William H. Albright and Villa C. Albright in the above-entitled action, together with a copy thereof, which said replication and copy were inclosed in an envelope securely sealed and postage prepaid and addressed and directed to the said attorneys for the said above-named [43] defendants, Cooper & Stephenson, Attorneys at Law, Great Falls, Montana, to be delivered to the said Cooper & Stephenson as attorneys for the said defendants at Great Falls, Montana; that said original replication was so enclosed and forwarded to said Cooper & Stephenson for the purpose of securing acceptance of service of said attorneys, and the copy was for the files of said attorneys.

E. LIEBERG.

Subscribed and sworn to before me this 17th day of February, 1912.

S. C. FORD,

Notary Public in and for the State of Montana, Residing at Helena, Montana.

My commission expires Sept. 7, 1912.

[Indorsed]: Title of Court and Cause. Replication. Filed Feb. 17, 1912. Geo. W. Sproule, Clerk.
[44]

Thereafter, on March 22, 1912, an order *pro confesso* as to defendant Jennie Peterson was duly filed and entered herein, being in the words and figures following, to wit:

*In the District Court of the United States, for the
District of Montana.*

UNITED STATES OF AMERICA,

Complainant,

vs.

JENNIE PETERSON (Formerly JENNIE
BENEDICT), WILLIAM H. ALBRIGHT
and VILLA C. ALBRIGHT,

Defendants.

**Order Pro Confesso as to Defendant Jennie Peterson,
Formerly Jennie Benedict.**

It appearing that an order was duly made in the above-entitled cause on the 9th day of December, A. D. 1911, requiring and directing the defendants to appear in the District Court of the United States in the city of Helena, State and District of Montana, on the 1st day of January, 1912, and then and there to plead, answer or demur to said complainant's bill of complaint exhibited against the said defendants in said court by the complainant, and to receive what the Court should consider in said behalf; and

It further appearing that said order so made as therein required and directed was served on the defendant Jennie Peterson (formerly Jennie Benedict) personally on the 13th day of December, 1911, four miles west of Logging Creek, Cascade County, Montana; and

It further appearing that the said defendant Jennie Peterson (formerly Jennie Benedict) has failed to appear in this suit either personally or by counsel

and that the time to plead, answer or demur to said complainant's bill of complaint has expired: [45]

Now, therefore, on motion of James W. Freeman, United States Attorney for the District of Montana, and solicitor for the complainant,

It is ordered that the complaint in said cause as to the defendant Jennie Peterson (formerly Jennie Benedict) be taken *pro confesso* against said defendant Jennie Peterson (formerly Jennie Benedict) in accordance with the rules in such case made and provided.

Dated the 22d day of March, 1912.

J. W. FREEMAN,

United States Attorney, District of Montana.

[Indorsed]: Title of Court and Cause. Order *Pro Confesso* as to Defendant Jennie Peterson. Filed and Entered March 22, 1912. Geo. W. Sproule, Clerk. [46]

Thereafter, on Jan. 14, 1914, Decree was filed and entered herein, in the words and figures following, to wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Complainant,

vs.

JENNIE PETERSON (Formerly JENNIE BENEDICT), WILLIAM H. ALBRIGHT and VILLA C. ALBRIGHT,

Defendants.

Decree.

In this cause the proofs having heretofore been taken and reported to the Court, and the cause having been duly argued by counsel for complainant and defendants and submitted to the Court, and the Court having duly considered the cause, and having heretofore on the 19th day of August, 1913, found and determined that the evidence taken in said cause is not sufficient to sustain the allegations of the complaint, and that said complaint ought therefore to be dismissed, on motion of Cooper & Stephenson, attorneys for defendants,

IT IS ORDERED, ADJUDGED and DECREED that complainant take nothing by its said complaint in this action, and that said cause be, and the same is hereby dismissed, and that the title to the lands which constitute the subject matter of the action be quieted in the defendants herein having title to the lands involved, their heirs and assigns, as prayed for in their answer herein.

Done in open court this 14th day of January, 1914.

GEO. M. BOURQUIN,

District Judge.

[Indorsed]: Title of Court and Cause. Decree. Filed and entered Jan. 14, 1914. Geo. W. Sproule, Clerk. [47]

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby

certify that the foregoing papers hereto annexed constitute the judgment-roll or final record, in the above-entitled action.

Witness my hand and the seal of said court at Helena, Montana, this 14th day of January, 1914.

GEO. W. SPROULE,
Clerk.

[Indorsed]: Title of Court and Cause. Judgment-roll. Filed Jan. 14, 1914. Geo. W. Sproule, Clerk. [48]

That on August 18, 1913, the Court's Decision was duly rendered and filed herein, in the words and figures following, to wit:

[Opinion.]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Complainant,

vs.

JENNIE PETERSON et al.,

Defendants.

Herein, the Court finds the allegations of the bill of complaint are not proven, and therefrom concludes the bill should be dismissed. Decree accordingly.

August 19, 1913.

BOURQUIN, J.

MEMO.

The Court refers to its comment in the companion case, No. 226, United States vs. Charles Gustafson et al.

The evidence herein falls short of the high degree of proof the Government must produce to warrant cancellation of its executed contract, its patent and grant of title. It may be the truth is as complainant alleges, but the evidence in quantity and quality does not satisfy and convince the court it is so. It serves to arouse suspicion it may even preponderate in favor of complainant, but that does not suffice. It may be fraud triumphs and the guilty escapes, but that does not warrant a contrary conclusion herein. When the Government deliberately issues its patent to lands, the instrument is high and solemn evidence of its own validity, to be overcome only by clear and convincing evidence, in quantity and of quality which commands respect and produces conviction. Peterson does not commend herself to credibility.

There are no circumstances to corroborate Peterson. Ticket, letters, etc., of which she speaks, rest on her [49] testimony. Albrights deny her statements. Her insistence that her lands should have water thereon is inconsistent to some extent with an agreement with Albright. She may have had some such arrangement as Carter. Albright's books are inconsistent with her testimony that he paid all her expenses on the land. If as Whittaker says many of Albright's quarrymen were taking up lands for Albright, why should he have sent to Michigan at his expense for Peterson?

Upon the whole, the proof fails.

[Indorsed]: Title of Court and Cause. Court's Decision. Filed Aug. 18, 1913. Geo. W. Sproule, Clerk. [50]

That on the 11th day of April, 1912, an order appointing a Special Examiner to take the testimony was made and entered herein, as follows, to wit:

**[Order Appointing Special Examiner to Take
Testimony, etc.]**

No. 1091.

UNITED STATES

vs.

JENNIE PETERSON et al.

Upon motion of the United States Attorney, it is ordered that Dudley Crowther, Esq., of Great Falls, Montana, be and he hereby is appointed Special Examiner of this court to take the testimony in the above-entitled cause and report the same to this court.

Entered, in open court, April 11, 1912.

GEO. W. SPROULE,
Clerk. [51]

That on May 20, 1912, a Stipulation as to the testimony herein was duly filed in said cause, in the words and figures following, to wit:

*In the District Court of the United States for the
District of Montana.*

UNITED STATES OF AMERICA,

Complainant,

vs.

JENNIE PETERSON, WILLIAM H. AL-
BRIGHT and VILLA C. ALBRIGHT,
Defendants.

Stipulation [Re Taking of Testimony, etc.].

It is hereby stipulated and agreed by and between the parties to this action, by themselves, or through their respective counsel, that the testimony herein may be taken in shorthand by Dudley Crowther, and thereafter reduced to typewriting, without requiring the witnesses testifying before him as Special Examiner to subscribe said testimony, and the transcript of the testimony of such witnesses, when completed and certified by the said Dudley Crowther as to its correctness, shall be considered by the United States District Court as the testimony of said witnesses as fully and effectually as though the same were in fact subscribed by them.

Dated April 24, 1912.

S. C. FORD,

Asst. U. S. District Attorney, Counsel for the Complainant.

COOPER & STEPHENSON,

Counsel for the Defendants William H. Albright and
Villa C. Albright.

Filed May 20, 1912. Geo. W. Sproule, Clerk.
[52]

That on February 19, 1914, notice of motion to approve statement of evidence on appeal was duly filed herein, as follows, to wit:

In the District Court of the United States, District of Montana.

IN EQUITY—No. 1091.

UNITED STATES OF AMERICA,

Complainant,

vs.

JENNIE PETERSON (Formerly JENNIE BENEDICT), WILLIAM H. ALBRIGHT and VILLA C. ALBRIGHT,

Defendants.

Notice [of Motion to Approve Statement of Evidence on Appeal].

To Messrs. Cooper and Stephenson, Attorneys for William H. Albright and Villa C. Albright, Two of the Above-named Defendants, and Jennie Peterson, Defendant:

YOU WILL PLEASE TAKE NOTICE that the undersigned, solicitor for the complainant and appellant herein, has this day lodged with the clerk of the aforesaid court complainant's statement or proposed record of the evidence on appeal herein, and that at the city of Great Falls, in the State and District of Montana, on the 2d day of March, A. D. 1914, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, the undersigned will ask the Court or Judge to approve the aforesaid statement

of the evidence on appeal herein.

Dated this 17th day of February, 1914.

B. K. WHEELER,

United States Attorney, District of Montana, Solicitor for Complainant.

Due service of the foregoing notice is hereby admitted this 17th day of February, 1914.

COOPER & STEPHENSON,

Solicitors for Defendants.

[Indorsed]: Title of Court and Cause. Notice. Filed Feb. 19, 1914. Geo. W. Sproule, Clerk. [53]

That on February 17, 1914, a Statement of the Evidence on Appeal was duly approved and filed herein, in the words and figures following, to wit: [54]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Complainant,

vs.

JENNIE PETERSON (Formerly JENNIE BENEDICT), WILLIAM H. ALBRIGHT and VILLA C. ALBRIGHT,

Defendants.

Statement of the Evidence.

BE IT REMEMBERED that the above-entitled action was upon motion of the United States Attorney referred to Dudley Crowder, Esq., by an order of

the above-entitled court duly made and entered in the above-entitled cause on the 11th day of April, 1912, which order appointed said Dudley Crowder, Esq., special examiner of this court to take the testimony herein and report the same to this Court.

That the parties to the above-entitled action on the 24th day of April, 1912, stipulated through their counsel that the testimony herein should be taken in shorthand by Dudley Crowder and thereafter reduced to typewriting without requiring the witnesses testifying herein to subscribe said testimony and that transcript of the testimony of such witnesses, when completed and certified by the said Dudley Crowder as to its correctness, should be considered by the above-entitled court as the testimony of said witnesses, as fully and effectually as though the same were in fact subscribed by them. [55]

Pursuant to the order above mentioned the above-entitled cause came on for hearing by agreement of counsel, on the 23d day of April, 1912, and was, by consent of counsel, continued until April 24, 1912, at the hour of ten o'clock A. M.

That on said 24th day of April, 1912, at ten o'clock A. M., the said cause came on regularly to be heard before Dudley Crowder, special examiner, as aforesaid, at his office in the city of Great Falls, Montana, the complainant being represented by Mr. S. C. Ford, Assistant United States Attorney, and the defendants, Wm. H. Albright and Villa C. Albright, being represented by Messrs. Cooper & Stephenson. The following proceedings were had and the following

testimony was given by the respective witnesses, to wit:

[Testimony of Jennie Peterson, for Plaintiff.]

JENNIE PETERSON, being first duly sworn as a witness for and on behalf of complainant, testified as follows:

Direct Examination.

(By Mr. FORD.)

My name is Jennie Benedict Peterson. I was formerly Jennie Benedict and married Mr. Peterson in November, 1905. I am the person who made homestead filing near Albright, but I cannot describe it. I made my homestead application about the 9th, 10th or 11th of July, 1901. At the time I made my homestead filing on the land, I had never seen it. I had been working at Mr. Albright's when I was younger and there were several parties taking homesteads for him and I said: "When I get old enough, I would like to take up a ranch." This was at the table at Mr. Albright's. I do not remember whom I made that statement to. Mrs. Albright might not have been present that year, but there were a great many present—a couple of other ladies who were working there. Just in common conversation I said I would take up a homestead for Mr. Albright. This must have been when I was about eighteen years old. After that [56] I worked for Mr. Albright for two and half year before I filed on my homestead, not continuously but a few months in the spring. I had been living with my mother in Michigan just prior to filing on the land. Two or three months

(Testimony of Jennie Peterson.)

before coming west to file on the land, I had some correspondence with Mr. Albright. I have not got the letters I received from him, but I remember the substance of them. I suppose the letters were destroyed; I never keep old letters packed up in my trunk. They were destroyed—I was at home and I think my mother read the letter. The contents of one letter I remember; Mr. Albright wrote to me and said he understood that I wanted to come west again and that I was old enough and could file on a homestead, and that he had a piece of land in view and if I decided to come west again to let him know and he would send me a ticket, which he did. I answered his letter and he later sent me a ticket to Crosswelle, Michigan. I used the ticket, leaving Michigan July 5, 1901. I went to the Great Falls Hotel and I saw Mr. Albright in that town. His family was also in town. I had written Mr. Albright a letter about the time I would leave Michigan. When I met Mr. Albright in Great Falls, he told me the papers were ready in Prior's office, and I went in there and filed on my homestead, or was supposed to file on my homestead. I had not been on the land; did not know where it was located; did not direct Mr. Prior to prepare the papers; and I did not have anything to do with the preparation of the homestead filing. I don't know who paid Mr. Prior for his services—I didn't. I don't recollect filing the papers in the land office but I may have, if the land office was in a room on Third Street and Central. I did not pay the filing fees and do not know who paid them. I wanted to take up a

(Testimony of Jennie Peterson.)

homestead with water on and Mr. Albright said I could. Mr. Albright and I discussed what I was to receive for the land when I proved up on it. When I filed on this land I was to commute and prove [57] up on it at the end of fourteen months, and I was to receive \$640.00, or the same as the rest of them would receive for their homestead right, and if I kept it for five years, which I tried to do, Mr. Albright says he might do even a little better by me, because it would not cost so much to prove up on it. At the time we were in Great Falls, when I made my homestead entry, he said I was to receive the same as the rest of them that took up homesteads. I understood that was \$640.00. Mr. Albright would pay the expenses during the life of the entry; he built the house for me. After making my entry sometimes I worked at Mr. Albright's and sometimes I lived on my homestead. I did not live there much during the year 1901. In the early spring of 1902 I visited the ranch—the cabin was then completed. I never had anything to do with building the cabin. I resided on the land most of the summer of 1902. I had my trunk there and called it my home—I lived on there. There wasn't a week I wasn't there. I was there for two weeks at a time, steady. Part of the time it wasn't a very busy season. I was working at Mr. Albright's. When I lived upon the land Mr. Albright furnished me with provisions. That was part of his agreement, at the time I made the filing; he was to pay all expenses. I knew Mrs. Albright; she lived with Mr. Albright. She knew where I was working.

(Testimony of Jennie Peterson.)

She and I often spoke about the land and she said they would have lots of land for the boys. She made other statements concerning my entry depending how she felt; sometimes she spoke favorably of it and other times called it a lot of worthless land. She never heard the agreement I had with Mr. Albright but it was understood that Mr. Albright was to buy the land. She knew that. I have heard her make statements like this, that the boys would own the land upon that hill, or on the bench, that they would have a nice ranch for the boys. That land embraced about all our homesteads. Willie, one of the children, visited me on my ranch once in a while; I think he [58] was six or seven years old. I never heard his mother say anything to the child in particular, only that he could be a rancher; she used to joke that he would be a rancher. He might start in early and be living on the ranches up there some day. During the time I lived on the land and during the life of the entry, I never paid out anything for expenses in the way of improvements. I could not state who did the labor, but I think Peter Parker and Gustave Herman put up the cabin. I submitted final proof in August, 1905; Mr. Quick and Mr. Benson were my witnesses. I had another man there for witness, but I did not use him. I went over for Mr. Quick at Mr. Albright's request to get him as a witness. I did not pay the expenses of my witnesses; Mr. Albright gave me money to pay Mr. Benson; he gave me ten dollars to pay him, the one I did not use. This was in the Grand Hotel. Mr. Peterson, Mr. Albright and I

(Testimony of Jennie Peterson.)

were there. I don't know that the other witnesses were paid. I don't know where the final proofs were prepared or who made them. I had nothing to do with them; I don't know at whose request they were prepared; I did not do it. I suppose I went to the land office in the courthouse to sign the final papers. I don't know who was present. Mr. Albright might have been in the corridor. I did not pay the filing fees or the fees on final proof. I made commuted proof. Mr. Albright gave me the money; I didn't furnish the money. Mr. Albright gave it to me. He gave me \$150.00 in cash. I used that in paying the filing fee. After my final receipt came I transferred it to Mr. or Mrs. Albright. I did this in Great Falls at Mr. Prior's office. He and Mr. Williams prepared the deed. Mr. Albright told me to have the papers made out to Villa C. Albright, as he desired the property in her name for a while yet, all his property in her name. I got \$600.00 for the land; \$500.00 in a note of Mr. Albright and \$100.00 either in cash or by check. The note was signed by W. H. Albright. He did not sign as agent for Villa C. Albright; I never had any dealings with Mrs. Albright in [59] any regard; none of the business was in Mrs. Albright's name except the taking of the deed. The note was paid the next May by Mr. Albright to Mr. Peterson. I do not recollect any other conversation with Mrs. Albright with reference to my land or taking it up for Mr. Albright, other than what I have already told; it was generally understood among us all who took up land there; it was generally understood with

(Testimony of Jennie Peterson.)

Mrs. Albright that the land was being taken up for Mr. Albright or them.

I had another land transaction with Mr. Albright; I filed on a timber and stone claim for Mr. Albright in the spring of 1907. I had an understanding with him about that land; I proved up on it and he paid me for it; I don't know that I got title to it. Mr. Albright paid the expenses of filing and also the purchase of the land. I don't recollect exactly how much I got for making the filing, but I think it was some \$300 and some dollars. There was a check and the balance in cash. Mr. Peterson and I deeded the land to Villa C. Albright at Mr. Albright's request. Mr. Albright's name was signed to the check I received. Mrs. Albright's name was not on the check. I never had any transactions with her; she was living at Great Falls at that time.

There was a man on the bench who relinquished his desert claim to me; I had the relinquishment, but I think in my suit-case—it may be at home; I will look for it. This man who relinquished was Mr. Lavelle; he was paid a consideration. I do not know how much. The purpose in getting him to relinquish the land was so I would also have a desert claim joining my homestead. It was Mr. Albright who got Mr. Lavelle to deed me or sign over his relinquishment to me. We didn't exactly have an understanding about the amount I was to receive for the land after I had acquired title. I was to transfer when I did my homestead. Whenever I proved up on it. I don't remember how I made my desert

(Testimony of Jennie Peterson.)

filing on the land, but I think Mr. Albright had part of those filings put in my homestead; I had my homestead filings changed to embrace some of this desert. [60]

This is my signature to my homestead application (referring to Complainant's Exhibit 1), and this is my signature to the nonmineral affidavit, and this is my signature to my homestead proof (all referring to Complainant's Exhibit 1.)

Cross-examination.

(By Mr. STEPHENSON.)

Prior to my last coming to Montana, I did more or less work for Mr. Albright; I didn't work there in 1905; I spent six or seven months of that time on my homestead. I came from Michigan before filing on my homestead and prior to going to Michigan I had worked for Mr. Albright. I don't remember how much of the time I worked for him, because my grandfather lived on the bench, part of the time I was at my grandfather's. Sometimes I worked for Mr. Albright, but I worked different places. I am well acquainted with Mrs. Albright. I had been in Michigan about two years before returning to Montana in the summer of 1901. Mr. Albright wrote to me and told me that if I still wanted to take up homestead for him I could come back and they would give me work and I could prove up on it. I am certain he said: "If I still wanted to take up a homestead for him," I am sure of the words "for him." It is ten years since I saw that letter.

(Testimony of Jennie Peterson.)

I might have left it in Michigan as I never thought I would need it in the future. I left it in what was then my home—my mother is still living there; I never asked her to search for those letters and the letters may still be there, but I think it likely they are destroyed. The letter was written in Mr. Albright's handwriting. Not many weeks after that I received a letter saying he would send me a ticket to come to Montana on, and he later sent me the ticket. He said I could work for Mrs. Albright and I went to work for her right after Christmas. From July to December I stayed at my grandfather's ranch most of the time; I helped him; I had my hand cut and I didn't work much that summer. The Albrights [61] wanted me to work for them as quick as I was able to; I worked for them the remaining part of that winter and the following spring and summer. They have had different people employed; it was very agreeable place to work at times; we got along very well; it was a very lonesome place and they had difficulty in keeping help; my relatives lived in that vicinity. I don't know that I would rather *work than* other places; I worked at other places a good deal. I do not know whether the Albrights believed that I would stay more willingly than other people they could get who didn't have any connection in that vicinity. One of the inducements they made to me was that I could take up a homestead. I wanted one with water on it. I wanted a place with water so if I was ever left with it on my hands I

(Testimony of Jennie Peterson.)

could dispose of it; I could always get money on it from some place. I never intended to make a home on the place, and didn't want water on it for the purpose of making a home. I didn't know whether the water was on my homestead or desert, but I used the water, anyway.

I was born in Michigan, but did not understand the English language in a business way, at the time I filed on my homestead; I understood ordinary words. When I went into Mr. Prior's office, I was asked to sign some papers to make my homestead filings; I don't recollect that I read those papers, but I was told they were my homestead filing. I took my oath, that I was of age and born in Michigan, etc. Mr. Prior or some other gentleman asked me questions separately; I don't recollect who swore me, but I think it was Mr. Prior or Mr. Williams; it was right in the office; their offices don't seem familiar to me. I don't know whether I went to Mr. Cockrell's office; I know the place I was in, it was on Third Street, the corner there some place; I don't know the gentleman's name. The papers were made out and I signed them, but I don't recollect of them being read to me; they may have been. [62] I understand that whatever was in that paper I was swearing to be true; if they were read to me, I would understand that much. I don't recollect whether Mr. Cockrell asked me whether the statements were true. The statements in that paper which I swore were true were for the benefit of my pocketbook, and otherwise I didn't

(Testimony of Jennie Peterson.)

think anything about it. I knew I would do homestead duty which I did, and I lived on the place plenty. I told Mr. Albright that I would turn the ranch over to him on the same terms that he was giving the rest; by the rest I mean Peter Carter, August Enger, and Herman and Olive, and a few more I don't know. I think some had homesteads and some had proved up. I made a verbal agreement with Mr. Albright. I told Mr. Peterson that if I kept that ranch another year before I proved up on it, or kept it for five years, that Mr. Albright would never get it, and he told me to keep my word and come up to my agreement. That was just a few months before we were married. When I came from Michigan I went to the Great Falls Hotel; I met Mr. Albright on the corner of the street, and talked with him there in Great Falls the day after I arrived. The first thing Mr. Albright said was that he had the homestead papers ready to file; I could file on my homestead at once, papers were ready. *I been* through that country on horseback before when I was younger, but did not know the country from Mr. York's to Riceville; it wasn't familiar to me at all. Mr. Albright also said to me at that time that I could come and go to work later. I did not want to work just at once; I wanted to go out to my grandfather. I had my hand cut and I went to work at Mr. Albright's later. Mr. Albright told me at that time that he had the papers all ready for me to sign at Prior's office. He went there with me. I met him in the morning and we went to the office in the

(Testimony of Jennie Peterson.)

afternoon. He told he would fix my price for my homestead all right and would give [63] me the same as the rest of them. That was all that was said; I had not asked him what price he would pay, I understood that to be \$640.00. I said all right. I wanted to take up the homestead because I thought it would be a nice way to make the money. Mr. Albright did not give me to understand that when the homestead was proved up that he would buy it if I wanted to sell. It was his. I was to prove for him. It would do me no good—a piece of land upon a hill.

I am related to Frank Whittaker. I never asked Mr. Albright to give me a \$1,000. My husband never attempted to get a thousand dollars from Mr. Albright, and neither have I. Mr. Albright had used my name many times in rock claims or rock filings, and I had never recollected of deeding any to him, and when I used my name he always said that he would give me so much in a claim. There was no specified sum of money. He owed my husband and myself for some claims that we had previously signed to him. That was after Mr. Albright sold out. Mr. Albright said there was one claim on the paper and there were five or six. I didn't have any dispute with him; he finally paid Mr. Peterson and me for deeding the claims to him. I never wanted any more money than I got. There was no hard feelings between Mr. Albright and me until this case came up. Then Mr. Albright abused me one day on the road. Before that we had been more or less friendly; often Mr. Albright would get peculiar

(Testimony of Jennie Peterson.)

moods and notions in his head and we might have a little trouble, but we always adjusted that.

At the time he made the purchase of this land he paid me by a five hundred dollar note and he gave me some cash or checks. I don't recollect the details but I remember the note distinctly; that was in September or the last of August, 1905. [64] I was to receive \$640 for my homestead and the note was only for \$500; perhaps I received \$100 or more in addition; I don't recollect the amount exactly. Mrs. Albright said all her boys would be ranchers living out there sometime. Mrs. Albright spoke about the land I was holding in general with the other as a lot of worthless land and other times she would say she was glad that they were getting so much land for the boys. There was no discussion other than in general that my land belonged to them; it was an understanding—she knew as well as all of us knew. The bargain was not made with Mrs. Albright; it was with Mr. Albright; she didn't do any business, he did. She and I never had any discussion as to the price or my obligations to turn over the land, but she knew of it all right, because it was common conversation down there. Between Mrs. Albright and myself it was understood perhaps about my not being a rancher for long, that Mr. Albright or the boys would own the land pretty soon; they would own the whole country up there pretty soon. Mr. Albright had been buying considerable land up there. Everybody that had proved up turned over their land to him. I made my commutation

(Testimony of Jennie Peterson.)

proof in the land office; I don't know the name of the man; Mr. Albright was in town; I was in the room alone; I remember Mr. Burlingame was there. The gentleman I proved up before wrote my testimony; he read the questions; I answered them and he wrote the answers in. I answered the questions just as Mr. Albright told me to; he furnished me with a copy of the questions, or told me the questions they would ask, and I answered just as I was told to. I understood that I was swearing to that. No one has told me how to answer any questions here to-day. I took the land up for my own benefit, for the benefit of my pocketbook, for the money I was to get; I had already agreed to sell it to Mr. Albright. I couldn't tell whether I had sold it until [65] I had made my final proof. When I made my final proof and swore "Jennie Benedict being called as a witness in *his* own behalf in support of entry No. ———, etc." I knew better than to tell the man at the land office anything about the arrangement I had had with Mr. Albright; Mr. Albright told me not to say anything about it. I didn't have any property except a horse and Mr. Albright told me *that would* ask if I had any stock and he told me that he would give me a bill of sale for two cows, which he did and after I came out of the land office I handed the bill of sale back to him. So I owned those cows for a short length of time. I don't know that I knew what the word "alineated" meant and I didn't inquire when I swore to my affidavit. My husband and I haven't discussed the testimony that

(Testimony of Jennie Peterson.)

should be given at this hearing. I don't know who preferred charges against this homestead; Mr. Bennett was at our house some time last spring. He said he knew all about it and that I had never lived on it, but I told him I had and I don't know where he got his first information. I know he didn't get it from my husband. I don't know whether Frank Whittaker had written to Mr. Bennett or not; he was with Mr. Bennett and that was the only time Whittaker had been to our house. At that time Mr. Bennett contended that I had not lived on my homestead; I don't know whether others did or not. I had resided there sufficiently to call it my home. Mr. Albright was hard up he said and he asked me if I would take his note, and I said yes, I would take his note. Mr. Peterson told me to have the note made out with eight per cent interest. I don't know where Mrs. Albright was at that time, whether she was at the quarry or whether she was at home, I don't know where she was. I don't know whether Mrs. Albright was away on a visit some place out of the State or not, because I didn't work at Mr. Albright's during the year 1905. Mr. Albright did not give [66] me the explanation that Mrs. Albright was away and ask me if I was willing to take the note; he never considered Mrs. Albright when he went to do business; Mr. Albright was the one that did the business.

(Testimony of Jennie Peterson.)

Redirect Examination.

(By Mr. FORD.)

I went on the land Valentine's day and I filed my final proof in August, I think. I lived on the land the summer of 1902; my trunk was there and all my belongings at that time, the summer of 1902. We had often *spoke* Charles Gustafson's homestead—Mr. Gustafson and I. I had some conversation with Mr. Albright with reference to the Gustafson claim. Mr. Albright told me to ask Gustafsons if they intended to prove up on that piece of land, as he wasn't very friendly at the time with Mr. Gustafson, and I said I would, because Mr. Albright says, "If he does not, he can relinquish it and I can get somebody else to file on it." I inquired of Mrs. Gustafson as I had been directed by Mr. Albright, and I conveyed her response to Mr. Albright. I never talked to Mrs. Albright about the Gustafson claim. Gustafson's claim was included in the general conversations I had had—it was just "the land" up there. Mrs. Albright couldn't help but know that the land had been taken up for Mr. Albright, because she was always there when some conversations would be made about it. Generally she would say that that land was taken up "for us."

[Testimony of Peter M. Carter, for Plaintiff.]

PETER M. CARTER, being first duly sworn as a witness for and on behalf of complainant, testified as follows:

Direct Examination.

(By Mr. FORD.)

My name is Peter M. Carter; I live in Butte. My occupation is concentrating. I am acquainted with the defendant William H. Albright. I have known Mr. Albright about twenty years, I guess. [67] I have been in his employ, but I don't just remember during what period of time. I have lived at Albright, Montana. I was employed by Mr. Albright at the fluxing quarry at Albright in the capacity of master mechanic there. I filed on a homestead in the vicinity of Albright. I don't just remember when I made my filing; I think it is about nine or ten years ago, somewhere along there. Prior to the time that I made my homestead filing Mr. Albright and I talked over with reference to whom the title should pass when I acquired it from the Government. In case I did not want the land I took up, Mr. Albright was to take it off my hands. We had no particular contract in any way as to who should pay the expenses. Mr. Albright paid the expenses. There was just a small house placed upon the land. Mr. Albright furnished the material, put up the building. I built the house myself. During the time I was employed in the construction of the house I was in Mr. Albright's employ. During the time I was working on the house, I suppose I was being paid by Mr. Albright—salary went right along just the same all the time. During the

(Testimony of Peter M. Carter.)

time that I was supposed to be living on the property I was working for Mr. Albright. I don't remember how much of the time I lived on the entry; I would run up to the ranch every once in a while. I never actually established my residence on the homestead—never moved my belongings up there. I have stopped there, and go up and stayed occasionally on the ranch. After I had made my final proof and received my final certificate I sold it to Mr. Albright for \$640.00, I think it was. I had this agreement to transfer the property to Mr. Albright prior to the time that I filed; we talked it over in that way. I was to file on the land and he would pay the expenses, and when I acquired title I was to transfer it to him. I transferred the property to Mr. Albright, I think. [68]

Cross-examination.

(By Mr. STEPHENSON.)

It was about the understanding that Mr. Albright would take the land off my hands if I did not want it when I proved up. If I wanted the land there was no obligation upon me to transfer it to Mr. Albright. I really don't know if I bound myself to transfer it to him absolutely; I understood that he was going to pay \$640 if I wanted to sell it after I proved up. And he left me free to sell or not to him. It took four or five days to build the cabin; I don't know how far it was from the quarry where I worked as a master mechanic. I worked there every day, including the time I was building the house. There was nobody took my place in the quarry when I was off. I worked for Mr. Albright about two years be-

(Testimony of Peter M. Carter.)

fore I made the filing. I proved up at the end of fourteen months—commuted. I don't know anything about anyone else's affairs there.

Redirect Examination.

(By Mr. FORD.)

I did not bind myself in any way to absolutely transfer the title I might acquire from the United States to Mr. Albright before I received final receipt. I had been on the ground before filing on it; I knew the description and where the place was when I filed on it; I knew it well enough to describe it by legal subdivision—I could not do that now. I knew where the place was.

Recross-examination.

(By Mr. STEPHENSON.)

After I proved up I think I mortgaged it to the Cascade Bank. I deeded it to Mr. Albright within a few months after I had gotten my final deed.

**[Testimony of Jennie Peterson, for Plaintiff
(Recalled).]**

JENNIE PETERSON, recalled on behalf of complainant. [69]

Direct Examination.

(By Mr. FORD.)

That is the release and assignment of my desert entry that Mr. Albright secured for me.

Mr. FORD.—I desire to offer in evidence Complainant's Exhibit No. 3.

Mr. STEPHENSON.—No objection.

WITNESS.—(Continuing.) I believe the conver-

(Testimony of Jennie Peterson.)

sation I had with Mr. Albright about this suit was since New Year's; I was on the road going from my home to Albright postoffice; Mr. Albright said I was in for it, and he wanted to know what I was going to do about it. I said I was going to tell the truth and he told me I might get twenty years in the penitentiary if I said I took it up for his benefit because before I swore I took it up for my own benefit. I told him I would have lots of company if I went. I don't care to repeat the rest he said because it wasn't fit for anyone to hear. He told me to do the right thing when I testified. I don't know what he meant by the "right thing"; he didn't explain. He said he would make me a present. He said I must testify that I did not take it up for him and he didn't make any bargain with anybody. I would rather not tell what the conversation he said was. It wasn't fit for a dog to hear or a lady to repeat. It was abusive. The reason he talked that way was because his attorney had discovered that I put my name on those papers for Mr. Bennett, and that was what the trouble *the* started over.

Cross-examination.

(By Mr. STEPHENSON.)

He told me his attorney had discovered in town—I don't remember whose office he said he was in—but his attorney had discovered that I had signed papers to the effect that I took up the homestead for Mr. Albright and he said that there were one [70] or two men in there and they said, "Oh, what a damn fool Peterson must have been, allowing her to sign

(Testimony of Jennie Peterson.)

such a paper as that; that she would get at least twenty years in the penitentiary," and he said other things, and I informed him that Mr. Peterson didn't have anything to do with this, for he did not.

[Testimony of Frank C. Whittaker, for Plaintiff.]

FRANK C. WHITTAKER, sworn as a witness for and on behalf of complainant, testified as follows:

Direct Examination.

(By Mr. FORD.)

My name is Frank C. Whittaker; I make Great Falls my headquarters when here; I am a mine owner and own some land; I have known Mr. William H. Albright for sixteen or eighteen years. During that time he lived by a place called Albright postoffice. I know Mrs. Albright, Charles Gustafson and Jennie Peterson. I worked for Mr. Albright in about 1900 and was working with him as partner on things for six or seven years. I was interested with him in some mining claims. I am acquainted with the Jennie Peterson homestead; I first knew it about 1901 when Mr. Albright had talked to me about it and getting her to take up some land. I had my first conversation about Jennie Peterson with Mr. and Mrs. Albright about April, 1901. We three talked it over and thought it would be a good thing to get her to come out and take up land for Mrs. Albright. She thought it would be a good thing and had no objection; we could send for her. We had these conversations in April, May and June. Jennie Peterson—her name was Benedict then—was in Michigan. Mr.

(Testimony of Frank C. Whittaker.)

Albright suggested he would send her a ticket to come with and some money for expenses; first, that he was to ask her if she would come; she said she would, and he wanted to know if it was all right with me; I said, yes, and talked with Mrs. Albright and she thought it would be all right to have her come and keep books and take up some land. Miss Benedict came from Michigan and Mr. Albright met her here and had a description for [71] her to file on and showed her the description. Before that we staked and measured out the land with a compass; took a spirit level and spaced off about so far what *we about* 160 acres, and put up three or four rocks in place so we would know about where it was, and sometimes set a stake over on the side on the corner.

I know Miss Benedict took this homestead up for Mrs. Albright because Mr. and Mrs. Albright and I talked *about*; Albright said that he had to have it taken and signed over to Mrs. Albright so that it would clear him if there ever was any kick by the Government getting after him, and he said they could tackle the patent if it was transferred to Mrs. Albright. I know that to be a fact and talked about it. I heard them talk to one another; we three had a conference together. They said Miss Benedict was to receive \$750.00 when she got patent. There was a difference made her than some other people who had taken up land and sold to Mr. Albright; before she got patent she was to get the same as the rest; \$640.00, \$440 clear and he would furnish the *money commute* with. That if she would stay on the land 5 years

(Testimony of Frank C. Whittaker.)

and not commute he would give her \$750.00. There were improvements on the Jennie Peterson homestead. *They were* a board house about 12 by 14, maybe 12 by 16, a rather small one, and the stable is 10 by 12, or 12 by 14; no bigger than that. It was enclosed with a fence with several homesteads and mineral claims. It was not fenced by itself at first; afterwards another fence was put across, about the time she proved up. Mr. Albright built the improvements; Mr. and Mrs. Albright told me that they were paying for the improvements the same as they did for all the rest. After Miss Benedict filed on the land until she submitted final proof; two-thirds of the time she was working for Mr. and Mrs. Albright in the quarry keeping books, and I believe she went back to Michigan once on a visit; I don't know [72] where all, but I should judge two-thirds of the time or more during these several years keeping books for Mr. Albright, and then she stayed a few days on her ranch. Just before she proved up on it, I should judge she lived on it two or three weeks. She did not put no expense of her own, or nothing. She went up there and stayed night or two, perhaps five times during these years. Before the five or six weeks she went up there just before her final proof, that is the last time, she took up a few things. Prior to that time Mr. Albright would give her a horse from the quarry and some *some* grub and she would go up and stay over night. I know when she went up there for the three to five weeks that Mr. and Mrs. Albright told her to take provisions out of the kitchen

(Testimony of Frank C. Whittaker.)

and when they sent me up there once so that I could be a witness that I saw her living on the land, I took some things. Mr. and Mrs. Albright sent me up and said in case there would be any trouble I would be a witness that I saw her on the homestead. I got the provisions I took out of the Albright's kitchen. I have heard Mr. Albright talk about her taking up the land after she got back from Michigan and filed on it, and in my presence. I was acquainted with Mr. Gustafson; I have *known somewheres* about seventeen years, I think. I know the land he filed on as a homestead. I know pretty near the time when Mr. Gustafson filed, but I couldn't tell you exactly right the date; it would be about 1902, I think; I think it was after Jennie Peterson or Jennie Benedict had made her filing, I think, if I ain't mistaken. I know how he came to take up the land. Mr. Albright called Mrs. Albright in the front room and suggested to her they had better have Charley Gustafson take up land for her and asked what she thought, and she said yes, it would be all right, and seemed to be pleased. Then he said, "Frank and I will go up and stake it out and look it up," and he asked me different questions about coulees, where the best land was, and I told him about the coulees, and then we went up and looked at it and took a spirit level and staked it [73] out and kind of spaced it out and put up a little rock pile, and we didn't get through, and then he got Jim Bartlett to go up the next day and finish it 'cause I had to go and drive team. Mr. Gustafson was working all the time,

(Testimony of Frank C. Whittaker.)

practically, then in Albright's quarry; he was working perhaps a couple of years or three—three or four, something like that. Mr. Albright and Charley Gustafson and I, we talked about Gustafson's claim at different times, about the price and about taking it up. We asked him if he would take it up for \$440.00, that is, clear, or \$640.00, and he was to use \$200.00 of his own money to commute it; Albright said he would rather have it done that way, and then it would look better before the Government that they furnished the money, see? But he would pay *the* back the money afterwards so they get \$440.00 clear out of it. That is what he told him, the most of them, except one or two favorites. Mr. Gustafson was to get \$440.00 clear. I know whom the land was taken up for; it was taken up for Mrs. Albright and Albright. There was an enclosure of a fence that enclosed several other homestead and deserts in the same enclosure, and there was one side of the bench land for many miles was the river on the other side around there was a fence along there for five or six miles to enclose it, a big ranch. There was a house put up, that is all, I believe, and the first house, put it up of old tree tops,—sawlogs taken out of the butts and then used the tops, and they had been there quite a good many years before and they were getting dozy, rotten, and so Albright sent some men up there and done this. The placing of the improvements on the land was paid for out of money made out of the quarry there. Mr. Albright he told us all how he was acting attorney for his wife, and then he would call her in occasionally and suggest to her what would

(Testimony of Frank C. Whittaker.)

be the best to do. I know that Mr. Albright paid for placing the improvements on the land the same as he did for several of the others, because I seen him draw checks at different times, and then he would tell us. [74] Mr. Gustafson was working for Mr. Albright during the life of the entry. He stayed perhaps three or four nights during the first few years on the land, but just before he proved up on it a while took his family up there and stayed in the neighborhood, I should judge, *of* three or four weeks, along there. Just prior to proving up he had resided, that is, established his residence, there and took his family upon the claim, not before that. He was hurt in an accident; he was blowed up there with dynamite caps in the quarry. During the time he was disabled, when he wasn't in the hospital, he was at Mr. Albright's working for him. I had some conversation with Mrs. Albright about the Gustafson entry. Once I remember going up on the bench there and she wanted to know about where different ones took up land for her and Willie—she called her man Willie—and I showed some of the buildings, showed one place or another, and I pointed out one, one place, Charley Gustafson's would be such a place, and we couldn't see the house. Mrs. Albright and Mr. Albright and I talked about the price that was to be paid Gustafson for his land—we talked about it in the house together. And she asked Mr. Albright what was the price we was going to pay him, and he said, "The same as the rest; if he commuted it, it would be \$440.00 clear out of it"; and she said, "All right,"

(Testimony of Frank C. Whittaker.)

willing for him to take it up. There was some trouble between Gustafson and Mr. Albright after the final proof had been made about the price that was to be paid for the land. I hear Mr. Albright and Mrs. Albright talk about it, said Mr. Gustafson he didn't commute it, he *staid*, he let it run the limitation, five years, and then proved it up, either five or six years, that would be five years, little over; I believe the rule is to run as high as seven, inside of that; it might have run a little over five; and she said it was rather a poor piece of land, and said they didn't want to pay him so much as the rest because it wasn't as good as the rest of the land. Mrs. Albright made that statement. During [75] the period of time that I have testified to, my relations with the Albrights were friendly all the time; I was working there for their interests; I lived there a good deal of the time; I stayed in their house, but when I had my family we lived in the house, my family and I. I used to sleep in the Albright house when my family wasn't there, and they was back, I would sleep in Mr. Albright's house. I took my meals in Mr. Albright's house. The other men who were working for Mr. Albright took their meals in Albright's house. Mr. Albright first bought out my pre-emption claim, and then he wanted me to take out a homestead, and he talked to her and she said, "Yes, it would be all right," and then he talked to her and said, "What is the matter with getting several of the men?" and different ones he suggested—I was talked to by Mr. and Mrs. Albright about these various entries because

(Testimony of Frank C. Whittaker.)

I knew, I was in there working for him, and I knew the country better than they did; they would ask me all about the land, where the best piece was they could take up for them, the different ones, so I would tell them everything I knew about it, and we had conference between us in the day times in Mr. Albright's house; I would be consulted about these various business transactions; Mr. Albright took me into his confidence; I look after a good deal of his business there. We would have these conversations in Mr. Albright's house, in the front room, during the evenings, after working hours, after supper. Mrs. Albright and Mr. Albright and myself, us three, would be present. Mrs. Albright would take a little part in the conversation, *he* would do most of the suggesting, then asked me questions and she said it was all right. She was familiar with the general condition there and the general transactions that were taking place; *he* spoke about it to her, that he had to have them taken up and assigned over to her on account that if there was any trouble hereafter, that showed that he had nothing to do with it; he told that to her and me; she said it was all right. When [76] Gustafson made his final proof Albright told me that he paid for it, and Charley Gustafson paid for it, that is, he told me that Albright was to put up the money for it. I know who paid the fees that were paid at the time Jennie Benedict submitted her final proof; Mr. Albright drew a check, I believe; I was there and heard when they were talking about drawing the check. I have made a homestead filing up in that locality and I

(Testimony of Frank C. Whittaker.)

made one desert. Mr. Albright suggested to Mrs. Albright getting me to take up some land, and I told him yes, I told them I would, so I went and filed on land and he gave me the money to file on it. Mine was one of the first ones proved up, I believe, and I ain't sure, but it seems to me I deeded that to Mr. Albright and he said he was going to deed it then to his wife, which I understood that he did afterwards; he told me so. The title was to be all in her name in the end. I was to get \$750.00 and he was to pay all expenses, and then he told me he was doing pretty well by me, giving me so much work and one thing and another, that he would give me \$550.00 clear, and that is all I got out of it. This agreement was made before I had made my filing; before I entered the land. Mr. Albright gave me a check for the filing fee. Mr. Albright paid for having the improvements placed upon the land. Mr. Albright paid the final proof—the fees that I paid at the time I submitted proof. I took up a desert claim for Mr. Albright. My understanding with Mr. Albright with reference to the desert claim was that I was to get \$600.00 out of it clear and he was to pay all the expenses, improvements, and so it came late that fall and he couldn't get anybody to do the plowing and one thing and another, and when it come time to make proof he wanted me to come down, his wife to come down *and* a witness and my wife, and at the same time make my proof for my wife, and when we made proof for my wife it was all right because he done the improvements on it, and [77] when it came to me I says,

(Testimony of Frank C. Whittaker.)

“Mrs. Albright, I can’t do it; Mr. Albright has made no improvements as he agreed to, and I can’t perjure myself; there ain’t a thing done on it.” I never submitted final proof on my desert, and it went back by default. He said nobody would ever find it out, and I just thought he was maybe trying to get me in a trap and so I wouldn’t take my oath to it, when it wasn’t worked on. Of other people who entered land there for Mr. Albright there was Peter Carter and Hermann and Gus Engler and Clara E. Whittaker, Gusta Grote and Abe and Ed Olive two brothers, C. G. Lohmeier, Charley Gustafson and Mr. and Mrs. Albright each took a desert; Tom Herson—I guess I can call them all off if you give me time—and Mrs. Jennie Peterson afterwards took a timber claim; and Lizzie, Albright’s niece, took up a timber claim for him, but she did not work for it; she was just staying there, visiting; Andy Mozard took up land too; *he* is dead now; Gus Antonich, he took up a homestead. Mrs. Grote went down to prove up on a homestead three times and on account of Mr. Boulter appeared there, and then we had orders and so it was advertised to prove up, and I was one of the witnesses, and then we did not prove up on account of Boulter was there, and so after a while Mr. and Mrs. Albright said they would have her take it up as a timber claim, which she did. When people took up the claims and during the life of the entry they worked for Mr. Albright—that is, all but his niece from Missouri worked for Mr. and Mrs. Albright in the quarry. The niece was on a visit. Practically all the time

(Testimony of Frank C. Whittaker.)

these people worked in the quarry when they were supposed to be living on the land. I know that these different people took up the land for Albright because he used to hold conferences, the three of us together, you know, secretly, about the land and Mr. Albright and I would go out and stake it and look it over and he would talk to her and come back and everything was all right, and have them file on it; he would go down with them, pay their expenses and give them wages besides. I know [78] this because I have talked with them; he would sometimes call them up before me and we would talk about it, and he would ask sometimes about the land of me too, because I knew the country better. What I have testified about is what I know myself, what I have seen, and what Mr. and Mrs. Albright and myself talked about. This was the customary price for most of them; one or two favorites were to get \$440.00 when they commuted, and if they commuted and used their own money they would get \$640.00. Mr. Albright said he and Mrs. Albright would get all the land put together for stockraising, grazing and farming. I know good lime rock when I see it, and I worked it up a good many years there for Mr. Albright. I understand gypsum; I have located many thousand acres of it for myself. I had some gypsum, part of what he has now; my brother and I had it and we could not handle it in 1893, at the time of the panic, and I told Mr. Albright that he could have it if he could handle it. I am familiar with the general formation around the Jennie Peterson land; one edge of it is next to the

(Testimony of Frank C. Whittaker.)

creek; lime ledges crop out a little; but part of it good land, all good grazing land practically, and lots of springs on for water. I have seen gypsum float there, but I haven't seen the ledge; I know Mr. Albright set two or three different men up there digging; I know two Swedes and they dug about five holes and they came down one night and said they had struck a body of gypsum, so Albright sent them back to cover it up. I heard Albright talking with his wife and he said that gypsum was worth \$10,000 and that they would keep it quiet and would some day give Mrs. Peterson something out of it. I should judge the Peterson entry is between two and one-half and three miles from the quarry. Comparing the Peterson land with the quarry, the quarry is broken ledges along the creek; there ain't much plow land, and this here, part of it, is hilly, but it is oval so you can plow probably half of it on that one hundred and sixty, and some [79] big patches lay flat practically, and then two or three ledges of lime rock sticking out on the one hundred and sixty, one edge of it. The surface of the land would be more valuable for farming and grazing, but the mineral is down in, would be more valuable or as much valuable as the surface, I should judge, or more. I should call it mineral land because it is on a contact and it crops out toward Kibbey, half way toward Kibbey again, where Kelly used to live, it is on the same contract, and then there is big ledges a little way from it below on other land Albright has, and then he claims to strike it there in them hills, and we seen float there,

(Testimony of Frank C. Whittaker.)

Albright and I, float of gypsum and also marble and lithograph rock. In the ledges there would be first-class lime rock. Practically all the lime rock there, under the surface of that country for about six or seven miles along there, is all good lime rock.

Cross-examination.

(By Mr. STEPHENSON.)

I took up a desert for him and a homestead for him and her. I took up the homestead first. I took up the homestead in about 1900, and about 1901, I think, I filed on the desert. I couldn't say exactly whether I filed on the desert before I made proof on my homestead or not. I said something about him wanting me to swear that there was certain improvements upon that desert and that I wouldn't do it because I didn't want to perjure myself. I knew it was wrong to commit perjury when there was no improvements; *he* agreed to put on all the improvements. I filed on the homestead for myself, I believe. I swore I filed on it for Mr. Albright and Mrs. Albright; they were the ones that got me to take it. I didn't consider that I was perjuring myself when I made my homestead application. I did not consider that I was perjuring myself when I made proof on my homestead. I didn't find out that I was perjuring myself only [80] as they wanted me to take up the land for them I didn't know whether it was perjury or not. They told me to call it my home, take it up for him, and they told me to call it that way. I will be forty-six years the twenty-seventh of June coming. I was friendly

(Testimony of Frank C. Whittaker.)

with the Albrights about that time and for many years afterwards; I was friendly to Mrs. Albright up till last spring and also with Mr. Albright until two years ago this winter we were the best of friends. I didn't fall out with him; he fell out with me. I had not been threatening to sue him for the last two or three years; I haven't gone to pretty near every lawyer in Great Falls to get him to bring suit against Albright for you in the last two years; I haven't made a round of all the law offices in town seeking some attorneys to bring suit. I had Mr. Freeman to write Albright threatening to sue him. I came to your office at one time to seek you to bring suit; I went to three or four lawyers, because he owes me. I have never brought suit. For the last two years I have consulted three or four lawyers to try to get them to bring suit against Albright, and I have got a lawyer now. I did not send for Mr. Bennett and give him the information that started this investigation. Mr. Bennett asked me if I wouldn't go out with him and I went with him. I continued to work for Albright about six or seven years, straight along. I quit about somewhere in the neighborhood of four years ago, I guess—four or five years ago. We was in partners up to three years ago on some mining claims. I was not working at the quarry then. It has been four or five years since I quit working at the quarry. I stayed there part of the time in his house, my family and I. I used to stay there a good deal after my family had left there. The last time that I stayed there

(Testimony of Frank C. Whittaker.)

when I was working there would be four or five years ago. Clara Whittaker, who had a claim for Albright, was my wife at the time. She now lives in British Columbia, I [81] believe. If I remember right, Jennie Peterson went back to Michigan twice. She went back once before she made her homestead filing—she has been back three times. I believe she went back once between the times she filed on her homestead and the time she made proof; I can't tell you what year exactly. I was working for Mr. Albright at the time she came from Michigan—at the time she made her filing. I wasn't in Great Falls the day they made her filing; Mr. Albright came down. I heard some talk that took place between she and Mr. Albright when they came out—up at their place; but she wrote to Michigan. He made the agreement before, you know, writing, and we talked it over, Mr. Albright and Mrs. Albright and myself talked it over, and he said he would write and ask Mrs. Peterson if it was all right for her to come out and *if* keep books for him, and said he would send her ticket and money for expenses, and he would meet her in the Falls and show her what land to file on, and Mrs. Albright said yes, that would be all right. I know he showed me a letter or two that he got from Mrs. Peterson that she would take up land for him; I don't know whether they had another agreement or not; I couldn't say. The letter was that she would take it up for Mr. Albright and Mrs. Albright, both of them. I heard the conversation between

(Testimony of Frank C. Whittaker.)

Albright and Mrs. Albright and myself about taking up the land. I didn't hear any conversation between Mrs. Peterson and Mrs. Albright as to the bargain, but I heard them talk about going up and staying on the land—talked to Mrs. Albright, saying she must go and saddle up the horse and take up some grub; it was the understanding that she was to hold down a homestead for Mrs. Albright. Right personally I don't know as if I have heard any conversation between Mrs. Albright and Charlie Gustafson with reference to their claim; you see, Mr. Albright acted as attorney for them all, practically, for Mrs. Albright, and he would suggest a thing and tell Mrs. Albright, and before me, and we would talk it over and she would tell him yes, it would be all right, go ahead. I transferred my claim to Mr. Albright, I believe. [82] I had my agreement with Mr. and Mrs. Albright; there were the three of us together. Albright talked to her and asked her if it was not a good thing to get different ones to take up land for her, and then it was originally to be everything transferred to Mrs. Albright in the end. The only gypsum I saw right on the Peterson claim was just some pieces of float there, but Mr. Albright had two men digging there and had four or five holes, and they come down one night and fetched some gypsum, and so Mr. Albright and Mrs. Albright talked there together that evening and said they must send them right back to cover it up and not let anyone know they struck gypsum, because they didn't want the Government

(Testimony of Frank C. Whittaker.)

gypsum, because they didn't want the government to know anything about it. They claimed to have struck it on the Peterson claim—the men did, Gus Benson and Andrew Johnson. I saw floats of gypsum, that's all, in the hole. Where they dug out I suppose they struck it and then covered all up the float, and some float left there. I would never have gone up there and uncovered that hole to see whether there was gypsum there, but I located it for gypsum with some other parties, and we understood we could hold the gypsum, and intend to do it this spring; we located it some time ago. I have no interest in getting this patent cancelled; I didn't make any complaint on it. I thought it was cancelled, then I thought I would file right to-day first, because it was classified as mineral land, I understood; I understood the first one who located it as mineral could have it. I have located it for the mineral. I am not looking for the \$10,000.00; I am looking for the mineral. I intend to dig there this spring. I dug enough to make a location. I haven't had time to dig there yet; there's lots of time yet to do that. I couldn't say how long it would have taken to uncover that \$10,000.00 gypsum vein; you see it was freezing weather when I was digging there, done the filing work. About seven others are interested with me in that filing; Peterson is not interested. I just can remember without looking up [83] the papers who are interested. I can't tell without looking up the papers whether I took Gustafson in or not; I have got all the

(Testimony of Frank C. Whittaker.)

names on the paper. I made the filing. I have not acted as a kind of detective up there for the last two or three years to gather up evidence to get that patent cancelled so that I could make filing up there. I have seen and talked with Mrs. Peterson; she is my niece. She and I have not compared notes and talked over this thing from time to time so that our testimony wouldn't conflict too much. I have not talked to her a good deal about the case. Gustafson and I have spoke about the case once or twice, but we didn't talk much about it. I ain't sure if one of the Gustafsons, either Mr. or Mrs. Gustafson, is in on the gypsum filing, there might be one of them; I made so many locations—I do every year; I use different names all the time, different ones. I do not take them without consulting them; I always consult them. I have filed thousands of *actes* for myself and others. I haven't been a pretty good at land grabbing myself; I haven't got very much of my own; I haven't got any, practically, deed, any of my own, only what I bought from other people. The Peterson claim, the first edge of it, probably a straight line would be a half mile from the railroad; it might be three-quarters. Limestone there would have commercial value if they ever wanted to use it, that's all. There is limestone all along up and down. If limestone is not right next to the railroad they have to build a railroad to it, of course. I could build a railroad to this Peterson land; I would *built* it from the other railroad; come up the gulch, go right through it,

(Testimony of Frank C. Whittaker.)

quarry it out; there is a dry canyon. It is on the east side of Belt Creek; it is on the left-hand side going up. There is no wagon road that one can drive up, but with very little work you could make it that way; there is a horseback trail in there now; there is brush in there so you couldn't drive with a wagon.

By Mr. FORD.—We wish to introduce in evidence the certified [84] copies of the homestead entry of Jennie Benedict, now Jennie Peterson, marked Complainant's Exhibit 1.

[Testimony of Mary Elizabeth Gustafson, for Plaintiff.]

MARY ELIZABETH GUSTAFSON, called on behalf of complainant, testified as follows:

Direct Examination.

(By Mr. FREEMAN.)

My name is Mary Elizabeth Gustafson; I live at Albright, Cascade County, Montana, and am the wife of Charles Gustafson. I know the defendant, William H. Albright, and Villa C. Albright, his wife. I *first* them in October, 1903, at their quarry at Albright, where my husband was working. I have talked with Mrs. Albright about the men working at the quarry; she always spoke of them as "the boys" and she says, "If they hold the homesteads and work in the quarry they could make a little money and get a little headway while they are working up there; after they prove up on the homesteads and we buy it they can accumulate

(Testimony of Mary Elizabeth Gustafson.)

a little money"; she said the same thing to me. I think, almost the first evening I was there. The first evening I was there she said. "I do hope you like it, because Charley holds a homestead for us and if you can stay here until he proves up and sells it you can make quite a little money by that and by the quarry besides." When my husband was in the hospital I went out and took care of the children at Albrights; she wanted to go away. Mr. Albright, speaking of the boys who had worked for him and let them hold land for him, said he wanted *to care* of his boys, and if they hold a homestead for him they could stay in the quarry and work and accumulate a little money and prove up on the land, and he would then buy it from them. The last year we had the homestead, Albright did quite a good deal of improvement.

I know Jennie Peterson; I knew her from the time I came out to Albright; she was bookkeeper at the time I came out there. I know that Mr. Albright said when I was taking care of his children that Jennie Peterson had been in Michigan and that he [85] was expecting her out. She had been visiting her mother and parents; she went there in November and returned in March, and this was just before she came; it was in March he expected her and he said: "We let that girl take up a homestead for us just to help her out by working in the office and holding land there, so it gives her a show to make money in two places." It was common talk with everyone

(Testimony of Charles Gustafson.)

that the homesteads up there were for Mr. and Mrs. Albright.

[Testimony of Charles Gustafson, for Plaintiff.]

CHARLES GUSTAFSON, a witness called for and on behalf of the above-named complainant, testified as follows:

Direct Examination.

(By Mr. FORD.)

My name is Charles Gustafson; I have lived at Albright for fifteen or sixteen years; I know William H. Albright and Villa C. Albright, his wife, and during the past fifteen or sixteen years have been in the employ of Mr. Albright in his quarry. I know the defendant, Jennie Peterson, who was formerly Jennie Benedict and have known her about nineteen years; she was living at Albright keeping books for Mr. Albright at the quarry and attending to the postoffice and stores. I never saw her homestead but I saw the house on it when going to my homestead. She was working for Mr. Albright when she filed on the land. I had a conversation with Mr. Albright and he told me that Jennie Peterson was going out there to take up land for him; that was before she filed upon it; I had this talk in April or May and she filed in July. Mrs. Peterson told me she took up the land for Mr. Albright. That is all I recall of the Jennie Peterson entry.

Cross-examination.

(By Mr. STEPHENSON.)

I don't remember what year Miss Benedict first

(Testimony of Charles Gustafson.)

came to Albright to work. When I first knew her she was living on [86] Frank Whittaker's father's ranch. It was in 1901 that Mr. Albright said that she was coming up there to file on land for him; she was coming from Michigan at that time; she came in the summer of 1901; he did not tell me what land she was going to file on for him. Mrs. Peterson told me she took the land up for Albright; she first told me this in the fall of 1901.

DEFENDANT'S CASE. [87]

[Testimony of William H. Albright, for
Defendants.]

WILLIAM H. ALBRIGHT, being first duly sworn as a witness for and on behalf of the defendants, testified as follows:

Direct Examination.

(By Mr. STEPHENSON.)

My name is William H. Albright. I am one of the defendants in the above-entitled action. I live on a sheep ranch about three miles from Albright. Mrs. Albright and I were formerly the owners of the Albright quarries. I located up there the 17th day of October, 1892. When I was running the Albright quarries I was getting out blast furance flux for the B. and M. Smelter. I employed a considerable number of men from time to time; I started in with two men and sometimes had as high as ninety-two and ninety-three on the pay-roll, I guess a few times a hundred. I knew Charles Gustaf-

(Testimony of William H. Albright.)

son; he worked for me at the quarry as a common laborer first and then I put him on as a driller and powderman afterwards; after he got hurt I put him on as foreman. I couldn't remember what year it was he took up a homestead; it is a long time ago. He never entered into an agreement with me that he was to hold this homestead for my benefit; I never paid no filing fees for no one. I didn't pay his expenses to come down here to Great Falls at the time he came to file upon his homestead. I kept the books myself, and this is the only payroll I had; I guess some others kept it part of the time. Here is Charles Gustafson; the fifteenth and sixteenth he did not work—that is May, 1901; that was the time he came in here to file on his homestead; there was no land office here. The land office was in Helena, I think, but here is where he came in, but the Receiver's Receipt, I guess, shows the twenty-fourth. He wasn't working the twenty-first and twenty-second. You see, wherever, those crosses are he didn't work; might have possibly been those days, but then of course, ten years is a long time, but I think that is the [88] time, this time. He wasn't paid because here is what he was paid, shows right here; he got \$3.00 a day and worked twenty-five days and got \$75.00; here it is. Well, I handed him \$26.15 before; that amounts to \$75.00 altogether; then \$48.85 was the amount due and total amount was \$75.00. This \$26.15 I couldn't remember, you know; he got that in cash, you know. For his pay that month he got it in

(Testimony of William H. Albright.)

two installments. Sometimes a man asks me in the middle of the month to give it to him, and I give it to him, and it comes under the head of amount paid. Here is the total number of days, wages per day, amount paid, amount due, total amount; here it comes all in; he got that in his final check, \$48.85, and drew \$26.15,—might have been some cash and some other things, overalls and one thing and another, you know, tobacco and stuff. There was no land office here at that time; I guess they made application at Randall and Prior's, I think. I remember Barker and myself coming in with him. I was in Randall and Prior's office a few minutes; I was there to sign my name; had to have a witness, you know, and I didn't read the witness' statement; I was in a hurry, like; I always was them days. Mr. Barker took up a homestead on Pilgrim's Creek, and I was the only one that had ever been up there. Mr. Gustafson was a powderman, and there was a Heinze lawsuit, and I said, "I can't watch you boys," and I gave him and another man that was a licensed powderman from New York, and I gave him a batch to drill and blast while this lawsuit was going on; I told him I couldn't watch him, and look out for themselves, and told them not to go within one hundred feet of fire, sat by it, opened a box of caps and a spark flew into it and hurt his anatomy; he drew wages right along; part of his finger and part of his thumb and one or two other fingers were blown off. He was laid up a considerable time; he was in the hospital; the time-book

(Testimony of William H. Albright.)

shows how long he was in the hospital. He was injured while working for me; I built a house for him there [89] at the quarry, and he paid me rent for a little while for a part of the lumber and then he didn't pay me any more rent, and afterwards he tried to claim the place by the statutes of limitation. I built him a house at the quarry for him and his family to live in and they lived in it seven or eight years. I had a man breaking horses on the ranch—his name was John Lacey—and he asked me one day if Lacey could break a little land for him, and I said all right. I don't believe I charged for that; that was after he was injured. When he came to prove up I didn't say one thing; I gave him a quarter more than I did any other man on the job and helped him out that way for the same kind of work. I paid part of his hospital bill; I gave him checks several times. I didn't have him on the pay-roll, but I gave him a check for when he was hurt of some of my money. I didn't pay any part of the final proof expenses. I never seen his cabin until the summer of 1911. I didn't hire anybody to build it for him; there is a rancher by the name of Martin Hassett, who used to carry his child around a good deal, and Martin asked for work, and I said, "You can stay on my ranch until I get ready for you," and I put his name on my pay-roll. I didn't order him to do any work for Gustafson; if he did, it was on his own responsibility.

I never told anybody that I would pay them the same for their claims as I paid the rest. We have a

(Testimony of William H. Albright.)

considerable body of land—people come to us because they thought we had money, when they wanted to sell. I have scripped land up in that country and bought a lot from the N. P. I have acquired land from people who had not worked for me. A number of people who worked for me took up homesteads which I have not acquired. It cost me \$3.50, \$4.00 and \$4.25 per acre, along there, to buy scrip. The price of the scrip was really what gave the price of that land. In last summer, 1911, I bought 1250 acres from the N. P. at from \$3.75 to \$5.00 per acre in that vicinity joining the Gustafson and Jennie Peterson ranch. A whole lot of people who came to work for us in the early days, in the nineties, took up homesteads. It was not unusual for a man to come out and get work in my quarry and then go out to take a homestead. Jennie Benedict worked for me prior to her trip to Michigan; she started to work in 1895. I didn't send her any ticket to come back from Michigan. I did not meet her in Great Falls and take her to Prior's office to acquire a homestead. She was working there and said she wanted [90] to get married and thought she could get a fellow better if she had a homestead, so I got on the train and went down on it and got off at the corner common to sections 34, 35, 26, and 27 and walked down a quarter of a mile up the hill and part way along the line between 35 and 36 until I got to the common corner of sections 35, 36, 25 and 26 and then *a* stepped back 440 steps about a quarter of a mile and made a point there, and we were on every forty; she told me

(Testimony of William H. Albright.)

that she had to be on every forty; I had three Government land laws in the house and she read them. We was on every forty acres and then we came back and irrigated some trees. We had no agreement that I was to get her homestead when she proved, nor that I was to buy it. I probably went to Great Falls with her when she made her filing; no doubt I did, but I didn't pay the filing fee, or the expense of building her cabin. G. W. Hermann built it for her. My time-book shows that Hermann laid off from the sixth to the twenty-seventh; it took him only about three or four days to build her cabin, and the balance he was on his ranch. My book shows I did not pay Hermann for building the cabin. I did not pay any expense connected with the final proof; improvements, plowing or cultivating her land. Mr. Everett put in a crop one year; I told him to see Miss Benedict and she could put in a crop there. I never paid any of the expense. I sold my quarries February 20, 1911. The newspapers said I got \$100,000 for them. I didn't give possession until May 1st, and we ran that long according to agreement. The ninth of April came on Saturday. My bookkeeper, Mr. Lohmier, went to Great Falls and came up with Mr. Hall, the present manager, to take possession. Just about half an hour before the train came, Jennie Peterson went around the kitchen in the back way and came to the hall, and says: "Have you got anybody hid here?" I said, "What do I want to hide anybody for?" And then she said that if I didn't give her a thousand dollars, that she, Frank Whittaker, and

(Testimony of William H. Albright.)

[91] Charley Gustafson would swear me to the pen by a preponderance of the evidence; when she got through she was breathing awful hard and looked as if it was an awful nervous strain on her, because she was all out of breath and hissed at me like a snake when she went through her stunt. Frank Whittaker is her uncle; he has been after me the last three years, writing all kinds of letters; he never came to see me and said I owed him; he has been there and stayed all night with me and he has told other people that he was going to kill me. Whittaker never held any claim down for me. I had no agreement with him about holding down a homestead and I have never had any such agreement with any other person. I have never paid or agreed to pay any expenses of holding down or proving up on a claim with anyone. I have bought a very small percentage of the claims taken up around me. I took them in Mrs. Albright's name; she had been in Oregon when I bought some of the claims; she was in Great Falls when I bought the Jennie Peterson claim. I signed the note to Mrs. Peterson for her homestead because Mrs. Albright didn't like Mrs. Peterson and wouldn't sign the note. I paid Mrs. Peterson \$800. \$150 cash and \$150 check; Mrs. Albright reimbursed me for this money. We kept our money separate but I managed all the business.

Mrs. Peterson got some provisions and stuff and we charged it up against her wages. This book shows that she was at work, here, and here she wasn't, she was on the ranch. That is my writing;

(Testimony of William H. Albright.)

that is her writing, and then at the quarry and then at the ranch; she done all this work. When she was at the quarry she kept the books and when she was at the ranch I kept the books. Here she got \$8.75, that is for grub; she probably got some stuff out of the store; she didn't get any cash. In May, 1902, she got a final check for \$22.75; her wages were \$1 a day. She got \$10.25 and this check for \$17.25 was for grub and other stuff she got for her [92] ranch. She expected a raise of wages and I raised her to \$40 a month; this month she didn't get anything; it was all for lumber or something like that; here is \$11.60 she got and a check for \$28.40. The \$11.60 was in trade; in July, 1904, she got \$4 in trade and \$36.00 check. Here is where she paid \$110 on the fence. I prospected her ranch and found no gypsum on it. The Frank Whittaker prospect is on scripped land. Benson and another man told me they had found gypsum but that was on Section 24, not on the Jennie Peterson place at all. They never made any holes on her place; that gypsum ledge is above her place. I have had considerable trouble with Frank Whittaker; he tried to assault me with a gun in 1910.

Cross-examination.

(By Mr. FORD.)

During the time I have testified about I have been running the quarries, and a little farming; I had men who were not employed in the quarry; they worked on the ranch once and awhile. The time-book was kept for all the men to show when they worked and

(Testimony of William H. Albright.)

to show what the profits were of the quarry and whether it was a business proposition. I kept some of the time of the men who worked on the ranch, I didn't keep it all here. This book is practically for the men at the quarry only. If some of the men whose names appear here worked part of the time, such time on the ranch might not appear in this book. Mr. Gustafson never got a cent except what is in that book. He never was employed by me at the ranch. Mr. Whittaker worked at the ranch once and his name appears here; he only worked at prospects for me, for several years; I grubstaked him; he put in time and got paid for it on the prospects; the time he was paid for work on the prospects does not appear here. The men who worked on the ranch are not entered here; sometimes I worked men on the ranch from the quarry and they appear here. [93]

Jennie Peterson and I marked off her claim a while before she filed—about a week before. I says: "Whenever it is convenient and I have some business in town I will go with you." All of the business in the quarry and at the ranch was carried on in Mrs. Albright's name. She leased the land to the B. & M. Smelter and received the royalty and I had the contract to get out the rock in my own name. She got three cents a ton royalty and I received forty and fifty cents a ton getting it out. My wife and I never kept any books, just memorandum slips, and we would settle up every little while; I owe her money right now; she got more money out of the royalties than I did from the contract for getting the rock out.

(Testimony of William H. Albright.)

Jennie Benedict, Jennie Peterson, kept a memorandum of my account with her showing what she took to her ranch. We settled up; she wanted to go away; I paid her off and did not have any more work for her to do; we were going to fence the school land and had gotten out some posts and she said she wanted some fencing done and asked how much it would be. We figured it up and it amounted to \$110. So I said, "All right, you pay me and I will get your fencing and put it up." Part of the fence we put up was new and part of it old; just repaired the old; the claim had been taken up five or six times and had been cancelled before. I constructed the fence on the Jennie Peterson claim and she paid me for it. I didn't build her cabin; a fellow by the name of Hermann did that, in December. Hermann said: "I want to build Jennie's house." He was working for me then. My book shows that he was not employed at the quarry from December 6 to the 27th in 1901. He never drew a dollar unless he was at the quarry. He was a carpenter. He never did any work at my ranch. I didn't send him out to the Jennie Peterson homestead to build the cabin for her. He said, "I want to lay off. I don't feel very good." He was gone that long and didn't get any pay while [94] he was gone.

Jennie Peterson had been working for us ever since 1895, and I don't remember that she had been in Michigan just before she made her filing—that is a long time ago. I know she took several trips there; I never wrote to her while she was in

(Testimony of William H. Albright.)

Michigan on any of those trips. I never wrote her or anybody because it never was satisfactory. She is mistaken if she says that she had any correspondence with me. I never sent her any ticket to come back from Michigan on; she is lying if she said I did. She was out there a couple of weeks or so when she made the entry. This morning I testified what we done. Do you want me to repeat it? I came to Great Falls with her when she made her homestead entry—I often had some business in Great Falls. She certainly is mistaken if she testified that she came from Michigan to Great Falls directly and met me here for the purpose of making her homestead entry—she knows better. I didn't pay her filing fees. I didn't encourage anybody to take up homesteads or make any inducements to anyone. Supposing you had a horse to sell for \$150 and I can buy it from you, do you think I would have Frank Whittaker buy it from you and give him \$150 or buy it direct from you? If I wanted all that land I could scrip it. I didn't have to steal it or go into cohorts with somebody when I could scrip it. No one was offered the inducement of getting anything for his homestead after final proof. There was no such bargain, contract or thought of that kind in my head at all. If a man wanted to work he could; if he didn't he got fired. Lots of persons living on homesteads worked for me and lots of them didn't. I purchased some of them, not more than one in ten. I didn't think anything of buying their homesteads until they came to me with their patents. I would know whether they had been work-

(Testimony of William H. Albright.)

ing for me; I didn't make any inquiry about whether they lived on their claims or not; I didn't think there was any chance; they had a patent; I thought that was final—thought nothing about it at all.

Before Jennie Peterson made her homestead filing, I never had any talk with her about it; she said she wanted a home of her own. I didn't have an agreement to buy it from her. I didn't tell her that I would give her more than the rest if [95] she didn't commute and proved up at the end of 5 years. I always thought she made a five year proof until I read that testimony. I didn't tell her I would give her \$640 if she commuted. There was nothing said about the rest at all, no reference to anything except she wanted to sell that homestead. She bought the lumber for the cabin and charged it up against herself on the books. It is just showed in the time-book. She never got any cash, in the final check she paid for groceries and other things. My time-book does not show that but I know she got no check except the final one. Every month she settled up, she said I got so much for lumber and so much for this and so much for that, probably a garden hoe, something like that; we had those things there. During the time she was working for me she had her trunk and all furniture she had on her homestead; she slept on her homestead when she was there. Her homestead was about two and a half miles from the quarry; she had a horse. The time-book shows that sometimes she would stay on the entry a long while; she would be on the claim so many days, then back, and so on. I

(Testimony of William H. Albright.)

went by the claim several times and she was living on her homestead and she told us she was going to her homestead. I never sent any provisions up there for her; she had a horse and told me that she bought her bread, eggs, and butter over at Mrs. Rice's. She didn't have a patent for the land when I bought it. She said her *mortgage* had a \$300 mortgage on her farm and she wanted \$300 to pay off her mother's mortgage. I didn't come to Great Falls when she made her final proof. I think Mrs. Albright was in town here when I bought the Peterson claim. I told Mrs. Peterson I was purchasing the land for Mrs. Albright. I paid \$150 by check and \$150 in cash. I had nothing to do with her final proof. The money was paid August 28th. Although my wife was in town, I signed the check and the note, because Mrs. Albright wasn't on very good terms with Mrs. Peterson and would not sign them. [96]

I told Mrs. Albright I was going to buy the land in her name. I don't remember all that Mrs. Peterson said this morning. It is not true that \$200 of the \$300 I gave Mrs. Peterson was for the final proof fees. I paid it August 28th; I have no book showing that; I don't know who my bookkeeper was then. I also purchased a timber and stone claim from Mrs. Peterson; I gave her \$640 for it; there were 160 acres in it. I don't know where she got the money to *making* her filing with. I never had any contract with her before she made her filing. I didn't pay the filing fees or the purchase price of the land, or give her the money for it either.

(Testimony of William H. Albright.)

Mr. Lavelle had a desert claim; he wanted to go to Alaska; he used to go and see her once and a while, so he signed the desert over to her; I scripped some land she had filed on and she filed on this desert. I think Mrs. Peterson made the deal with Lavelle for the relinquishment. I had part to do with it as I paid Lavelle \$80 for the school land and some fencing. I didn't pay anything for the relinquishment to Mrs. Peterson and I don't think she paid anything for it. I never saw Complainant's Exhibit 3. I didn't get Lavelle to execute that for Mrs. Peterson; she got that herself; her and Lavelle fixed it up; I wanted the school land; there was a spring on it and I wanted to carry the water 14,000 feet to some other land; I paid \$80 on that school land that he owed the State and got the land and paid him for the fencing; Mrs. Peterson got 80 acres of this land and I got 40 of Mrs. Peterson's; she got better land; I got a spring and she got two springs in the transaction.

My book does not show that the \$110 was paid by Mrs. Peterson for the fencing on her land; she figured out how much that would cost; she wanted the fence next spring; I was to get the material and put up the fence; I let it go on the wages. I remember that without any memorandum. I gave her a contract and [97] she gave me a contract back, when the fence was up the next year. I kept \$110 out on that fence, I didn't pay her; that is all the memorandum I have on that.

Mrs. Peterson tried to get money from me, blood

(Testimony of William H. Albright.)

money, on April 29, 1911, she came to see me; the next time I had a conversation with her was coming up from Northrup last fall. When this suit was filed, I asked her when she swore to the truth—the last time or the first; I didn't tell her what I wanted her to testify to or that I would make her a present if she would; I told her she was a perjurer and blackmailer. At the time I spoke to her about when the suit was filed, I believe I had read the testimony—the complaint. I hadn't seen any affidavit she had made then. She was going to hold me up for \$1,000; I knew she was up to something, deviltry. I knew if she hadn't made any statements no suit would have been brought.

Frank Whittaker used to go up to work on prospects for me and come back and say he had done so much and I would pay him; when I went to look he had never done anything; I never knew him to work in my life. He wasn't around my place very much; he worked a couple of months in the quarry; his wife lived right above us. When he was prospecting for me he didn't sleep in my house. We have never been good friends; he had some prospects; I grubstaked him and finally bought him out. Once I gave him a contract to cut some brush. I never talked freely to him; I never could stand him at all; he knew about the mountains up there. Mrs. Albright and I never talked to him freely. I never told him one thing, because no one took up land for me. He was not familiar with my business; never kept books for me; he is pretty crooked—doggone crooked. He drew a

(Testimony of William H. Albright.)

gun on me April 27, 1910. He didn't tell me why he drew the gun; was behind a door in the library; Miss Neihart was there keeping books for me, but was away; I came down in *my* [98] *as* I went to the table to get breakfast; he jumped from behind the door and stuck the gun in my face; he said, "Throw up your hands!" I flew upstairs; I didn't have a gun. He wrote a number of letters and told everybody that I owed him \$1500, but never yet told me that I owed him any money. He has never been in my house since. About three years ago Mr. Randall and I bought out his interests in the copper claims for \$2800; that was in March and in December he wrote me and says the money for the claims is now due. He took up a homestead and after he proved up I bought it from him. I bought his wife's desert claim after she had a patent. I had no contract of purchase with her; I didn't pay any expenses on the claims; when any men working for me got some stuff or clothing I put it in the day-book; I haven't got the day-book and don't know where it is. In the absence of any contract I never thought of buying Jennie Peterson's ranch; when I furnished anyone any lumber. etc., it would go into the day-book. If Jennie Peterson got any lumber it would show in the day-book. There would often be many small transactions with my wife but I kept them all on slips of paper; they are lost or thrown away. I haven't got those slips or my cancelled checks any more. We looked for them but only found the check I gave Mr. Stephenson.

I bought the Jennie Peterson homestead and paid

(Testimony of William H. Albright.)

for it partly by check; that check is dated August 29th, and final proof of that claim was submitted on August 5th.

Peter Carter had some dealings with me; he worked there; he took up a homestead; my wife bought it; she paid \$640 or \$700 for it; assumed a mortgage for \$350 on it; we didn't put the improvements on it; Carter fired a rock at me and I never gave him any work afterwards; I always try to be friendly with everyone. When he was here as a witness he and I were together; he asked me to loan him some money; I don't think we [99] are very good friends; I don't think anything of him in a business way. I don't think his testimony was as fair as to me as it was to the Government, because he said things that wasn't so. I never put improvements on his ranch or paid his expenses on his claim. I don't know how much time he lived on his claim, as I didn't pay much attention to it. I didn't care whether he had lived there or not. I didn't think I would ever purchase the land until they asked me to. I thought he had testified and proved up and that was all that was necessary. I didn't make any inquiries. Whittaker bought lots of stuff and charged it to me without my authority and I had to pay the bills. We were in prospecting business together—I just grubstaked him about 4 or 5 years.

Redirect Examination.

(By Mr. STEPHENSON.)

I never paid any of the expenses of the Gusta Grote claim; she never proved up.

(Testimony of William H. Albright.)

Recross-examination.

(By Mr. FORD.)

I acquired the Pete Carter and Hermann homesteads after patents were issued; also Gus Engler's, Clara Whittaker's, Ab. Oliver's, G. T. Lohmire's and my niece's timber claim.

[Testimony of Villa C. Albright, for Defendants.]

VILLA C. ALBRIGHT, being duly sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination.

(By Mr. STEPHENSON.)

My name is Villa C. Albright. I am the wife of William H. Albright and am one of the defendants in this action. I never had any conversation with Jennie Peterson about her holding a homestead for Mr. Albright or myself. I don't think there was any agreement existing between he and Mr. Albright that she was holding the homestead for him. We never had any conversations [100] with Jennie Peterson or anyone else in which we spoke of her homestead being her property or the property of Mr. Albright's. She and I weren't on very good terms. Frank Whittaker and Mr. Albright were not partners; Mr. Albright's chief occupation was looking after the quarry. Mr. Whittaker did some prospecting and Mr. Albright would grubstake him. Whittaker would come down from the mountains once in a while, probably two days, and stay at the house; he worked at the quarry a short time once. He and his

(Testimony of Villa C. Albright.)

wife lived about a half or three-quarters of a mile from our house. I never had any conversations in the presence of Mr. Whittaker in which I admitted that any people were holding down homesteads for us. I know of no agreement with Mr. Whittaker that he was holding his claim for us. I lived at the quarry nearly all the time, with the exception of the last six years. I didn't pay any attention to who had homesteads and were working for us at the same time. We had quite a lot of men working in the quarry. The lands were purchased in my name because I got royalties from the lime rock and that money of mine was used to purchase land with. I don't remember giving Mr. Albright a check to pay the Peterson note with. I allowed Mr. Albright to handle my moneys as he saw fit.

Cross-examination.

(By Mr. FORD.)

Jennie Benedict was working for us people; she stayed with us when she worked; I don't remember when she left our employ. She made our place her headquarters; I wasn't very friendly with her. She lived in our house. I don't remember when Mr. Albright bought her land; Mr. Albright asked me to sign a note to her and I refused. I never talked with her about her homestead. She lived with us several times; she never said what she was going to do with her homestead.

Frank Whittaker prospected and Mr. Albright grubstaked him; they were not partners; Whittaker slept and ate at our house. We never talked about

(Testimony of Villa C. Albright.)

land while he was there. We were all on [101] very good terms. He would come down with specimens and stay there; he never forced himself upon us. I don't remember what Mr. Whittaker and Mr. Albright would talk about; I don't remember anything being said about any men filing on homesteads. I don't know who placed the improvements on the Jennie Peterson land. Mr. Albright had power to sign checks and act for me in any business that might come up; he signed my name to checks; sometimes I would sign my name. Mr. Albright had the stone quarries when we were married and he deeded them to me; I don't know why he did it; he never told me he did it to protect himself against damage suits. He and I kept little memorandums of our business transactions. The royalties were paid to me and I would deposit them in the bank. Mr. Albright has little property in his name now; I don't know how much. There is lot of property in my name; *it mostly* all in my name. I didn't sign the Jennie Peterson note or check. I signed the check to Mr. Peterson for the note. The first check to Miss Benedict was not signed by me. I don't know that Mr. Albright and I ever had a settlement. I knew nothing of the transaction until he asked me to sign the note; I wouldn't sign the note because I didn't like Miss Benedict.

Redirect Examination.

(By Mr. STEPHENSON.)

I never gave Mr. Albright a written power of at-

(Testimony of Villa C. Albright.)

torney. Mr. Albright *didn't my* checks to draw out my royalty—he didn't sign my checks at all.

Recross-examination.

(By Mr. FORD.)

Mr. Albright didn't sign my name to checks in business transactions; we maintained separate bank accounts. I don't know how much money Mr. Albright owes me; I get royalties from the stone quarries every month; Mr. Albright hasn't used any of that money; I don't know when I gave money the last time. [102] I never had any conversation with Miss Benedict with regard to the ranch. My recollection is very good with reference to those transactions. I don't know whether Mr. Albright had any agreement with Jennie Benedict.

**[Testimony of William H. Albright, for Defendants
(Recalled).]**

WILLIAM H. ALBRIGHT, *recalled*, a witness for the defendant having been recalled, testified as follows:

Direct Examination.

(By Mr. STEPHENSON.)

Mrs. Albright got her royalty and it was kept in a separate bank-book—we had separate bank accounts. The royalty was paid to Mrs. Albright direct by checks made in her name. The checks were deposited to her credit in the bank. The expenses of the quarry were paid by my checks. If I ever got any monies from Mrs. Albright, she drew a check and gave it to me.

(Testimony of William H. Albright.)

Cross-examination.

(By Mr. FORD.)

No account was ever kept—she would give me money some time and I would deposit it in my bank. She really made money and I sometimes ran behind. I transferred the quarry to her because I was getting to be an old man, and if an accident happened we would have lost everything we had. We carried employers' liability insurance to protect the quarry and they paid the damages, and I gave a check besides as a present sometimes. When I married my wife she had no property except fifty dollars. the property was put in her name for protection; she leased it to the B. & M. Smelter; I closed the transaction without consulting her; some business I asked her advice about, but not very often.

[Testimony of O. C. Mortson, for Defendants.]

O. C. MORTSON, sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. STEPHENSON.)

I lived in Montana forty years; I am a surveyor and [103] a mining engineer. I know the Jennie Peterson homestead and have investigated it to see whether there was gypsum upon it. I claim there is no gypsum on that land at all, because of the formation which is visible on the land. The nearest approach of workable gypsum is a little over half a mile east from the claim higher up. I know where Frank Whittaker made a location; I surveyed

(Testimony of O. C. Mortson.)

the location and found it was 200 feet east of the Jennie Peterson homestead. Here are specimens of rock from Whittaker's location. They are partly iron, one-fourth lime and 66.6 manganese, and is no commercial value.

Cross-examination.

(By Mr. FORD.)

I have traced that gypsum formation all the way from Kibby to Smith River and that formation of gypsum does not come near the Jennie Peterson ground. The nonmineral affidavit Jennie Peterson swore to when she proved up was exactly correct. There is only a very poor quality of lime rock on her claim. The nearest gypsum to the Jennie Peterson entry is half a mile away. [104]

[Testimony of Grace Mitchell, for Defendants.]

GRACE MITCHELL, being sworn as a witness in behalf of defendants, testified as follows:

Direct Examination.

(By Mr. STEPHENSON.)

I worked for Mr. Albright at the quarries three different times. I know Mr. Gustafson and his wife. Mr. Gustafson come into Mr. Albright's office the last of July, 1910 for his money. He got his check and said that he wanted \$1,000 or he would swear Mr. Albright into the pen. Mr. Albright said he wouldn't give him anything. They had quite a few words. That was the substance of their conversation. Mrs. Gustafson came in the next morning and she said about the same thing. She said

(Testimony of Grace Mitchell.)

she would just as soon her husband went to the pen for 6 months *and* get him in for seven years. She wanted a \$1,000. She didn't say what it was for.

Cross-examination.

(By Mr. FORD.)

I had heard that Mr. Gustafson had been hurt in the stone quarry. I had heard that he received some insurance money for the loss of his hand. I didn't hear how much. I couldn't say for sure that I heard that Mr. Albright paid him something. I never heard that Gustafson and his wife claimed that Mr. Albright had promised him a \$1,000. Mr. Gustafson might have been in the office twenty minutes. No one else was present. Gustafson didn't say what he was going to send Mr. Albright to the penitentiary for. Mr. and Mrs. Gustafson didn't hesitate to ask Albright for the money in my presence—they talked out loud. [105]

That at the end of the transcript of the testimony taken in said cause, of which the foregoing is a narrative of all portions that relate in any manner to the homestead entry of Jennie Peterson, the Special Examiner, Dudley Crowther, duly affixed his certificate, as required by law, and rules of court.

WHEREFORE, complainant prays that the above and foregoing narrative of the testimony, taken in said cause, be settled, approved and allowed by the above-entitled court as a true, full and complete statement of the evidence relative and material to the issues in the above-entitled cause for use on the

appeal taken to the Circuit Court of Appeals for the Ninth Circuit.

B. K. WHEELER,
United States Attorney, Solicitor for Complainant.

Service of the foregoing proposed statement of the evidence and receipt of a copy thereof this 17 day of February, 1914, is hereby admitted and acknowledged.

COOPER & STEPHENSON,
Solicitors for Defendants, W. H. Albright and Villa C. Albright. [106]

[Stipulation Re Statement of Evidence on Appeal.]

It is hereby stipulated and agreed by and between the parties of the above-entitled action that the foregoing statement of evidence is a true, correct and complete narrative of the testimony taken at the hearing of said cause and is sufficient for use on the appeal taken herein to the Circuit Court of Appeals for the Ninth Circuit, and that it may be settled and allowed by the Court.

This the 2d day of March, A. D. 1914.

B. K. WHEELER,
United States Attorney, District of Montana, Solicitor for Complainant.

COOPER & STEPHENSON,
Solicitors for the Defendants William H. Albright and Villa C. Albright.

[Certificate of Bourquin, D. J., Re Statement of Evidence on Appeal, etc.]

I, the undersigned, Judge of the District Court of the United States for the District of Montana, here-

by certify that the foregoing statement of evidence is a true, complete and properly prepared narrative of all the evidence adduced at the hearing in the above-entitled action that is essential to the decision of the questions presented by the appeal taken herein, and I do further certify that the same has been duly served and filed as required by the rules of the court.

Dated this 2d day of March, A. D. 1914.

GEO. M. BOURQUIN,

Judge.

[Indorsed]: Title of Court and Cause. Statement of the Evidence. Filed March 2, 1914. Geo W. Sproule, Clerk. [107]

That on Feb. 17, 1914, Petition for Appeal and Order Allowing Same were duly filed and entered herein, in the words and figures following, to wit:

[Petition for and Order Allowing Appeal.]

In the District Court of the United States, District of Montana.

IN EQUITY—No. 1091.

UNITED STATES OF AMERICA,

Complainant,

vs.

JENNIE PETERSON (Formerly JENNIE BENEDICT), WILLIAM H. ALBRIGHT and VILLA C. ALBRIGHT,

Defendants.

APPEAL AND ALLOWANCE.

The above-named complainant, the United States

of America, conceiving itself to be aggrieved by the decree entered herein on the 14th day of January, A. D. 1914, in the above-entitled proceedings, does hereby appeal from said decree to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and prays that an appeal be allowed and that a citation issue as provided by law, and that a transcript of the records and proceedings and papers upon which said decree was based, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

B. K. WHEELER,

Solicitor for Complainant. [108]

The foregoing petition is hereby granted and an appeal is allowed.

Dated this 17th day of February, 1914.

GEO. M. BOURQUIN,

Judge of said District Court.

[Indorsed]: Title of Court and Cause. Appeal and Allowance. Filed and Entered Feb. 17, 1914. Geo. W. Sproule, Clerk. [109]

That on Feb. 17, 1914, an Assignment of Errors was duly filed herein, in the words and figures following, to wit:

*In the District Court of the United States, District
of Montana.*

IN EQUITY—No. 1091.

UNITED STATES OF AMERICA,

Complainant,

vs.

JENNIE PETERSON (Formerly JENNIE BENE-
DICT), WILLIAM H. ALBRIGHT and VILLA
C. ALBRIGHT,

Defendants.

Assignment of Errors.

The complainant in this action, in connection with its petition for an appeal herein, hereby makes the following assignment of errors, which it avers occurred in this cause:

1. The Court erred in finding the evidence taken in said cause, at the hearing thereof, was insufficient to sustain the allegations of the bill of complaint herein.

2. The Court erred in ordering a decree herein in favor of the defendants and against the complainant, dismissing complainant's bill of complaint.

3. The court erred in entering a decree herein in favor of the defendants and against the complainant, dismissing complainant's bill of complaint.

WHEREFORE, the said *complaint*, the United States of America, prays that the said decree of the said District Court of the United States for the Dis-

trict of Montana, rendered and entered in the above-entitled cause, be reversed.

B. K. WHEELER,

United States Attorney, District of Montana, Solicitor for Complainant.

[Indorsed]: Title of Court and Cause. Assignment of Errors. Filed Feb. 17, 1914. Geo. W. and figures following, to wit: [111]

That on Feb. 17, 1914, a Citation was duly issued herein, which is hereto annexed and is in the words and figures, to wit: [111]

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA.

Complainant and Appellant,

vs.

JENNIE PETERSON (Formerly JENNIE BENEDICT), WILLIAM H. ALBRIGHT and VILLA C. ALBRIGHT,

Defendants and Appellees.

Citation on Appeal (Original).

United States of America,—ss.

To William H. Albright and Villa C. Albright, Defendants and Appellees, and Messrs. Cooper and Stephenson, Their Attorneys and Solicitors, and Jennie Peterson, Defendant and Appellee,
Greeting:

You, and each of you, are hereby cited and admonished to be and appear before the United States Cir-

cuit Court of Appeals, for the Ninth Circuit, at the city of San Francisco, State of California, within thirty days from the date hereof pursuant to an appeal filed in the office of the Clerk of the District Court of the United States, for the District of Montana, wherein the United States of America is appellant, and Jennie Peterson, William H. Albright and Villa C. Albright are the appellees, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and reversed and speedy justice should not be done to the parties on their behalf.

WITNESS, the Honorable GEORGE M. BOURQUIN, Judge of the United States District Court, District of Montana, this 17th day of February, 1914.

GEO. M. BOURQUIN,

Judge of the District Court of the United States, for the District of Montana. [112]

Service of the within citation and receipt of a copy thereof this 17 day of Feby., 1914, is hereby admitted.

COOPER & STEPHENSON,

Solicitors for Defendants W. H. Albright and Villa C. Albright.

[Endorsed]: Original. No. 1091. United States District Court, District of Montana. United States of America, Complainant, vs. Jennie Peterson et al., Defendants. Citation. Filed and Entered Feb. 19, 1914. Geo. W. Sproule, Clerk. No. 940. [113]

That on Feb. 19, 1914, an acknowledgment of service and waiver by defendant Jennie Peterson was filed herein, in the words and figures following, to wit:

**[Acknowledgment of Jennie B. Peterson of Service
of Proposed Statement of Evidence, etc.]**

*In the District Court of the United States, District
of Montana.*

IN EQUITY—No. 1091.

UNITED STATES OF AMERICA,

Complainant,

vs.

JENNIE PETERSON (Formerly JENNIE BENE-
DICT), WILLIAM H. ALBRIGHT and
VILLA C. ALBRIGHT,

Defendants.

Service of the notice of settlement of the proposed statement of evidence herein and citation on appeal, in the appeal taken from the decree of the above-entitled court to the Circuit Court of Appeals for the Ninth Circuit, which decree was made and entered herein on the 14th day of January, 1914, and receipt of a copy of each and all thereof this 18th day of February, 1914, is hereby admitted and acknowledged.

Service of any and all other and further papers in relation to said appeal is hereby expressly waived and I hereby consent to any and all other and further steps in said appeal being taken without any notice of any kind to me.

Dated this 18th day of February, 1914.

JENNIE B. PETERSON,

One of the Above-named Defendants Appearing in
Person.

[Indorsed]: Title of Court and Cause. Acknowledgment of Service. Filed Feb. 19, 1914. Geo. W. Sproule, Clerk. [114]

Thereafter on Feb. 17, 1914, a Stipulation as to the exhibits was filed herein as follows, to wit:

In the District Court of the United States, District of Montana.

IN EQUITY—No. 1091.

UNITED STATES OF AMERICA,

Complainant,

vs.

JENNIE PETERSON (Formerly JENNIE BENEDICT), WILLIAM H. ALBRIGHT and VILLA C. ALBRIGHT,

Defendants.

Stipulation [Re Original Exhibits, etc.].

It is hereby stipulated and agreed by and between the parties to the above-entitled action that any of the original exhibits introduced in evidence on the taking of testimony herein and constituting part of the testimony herein, need not be included in the narrative statement of the testimony prepared for use on the appeal herein, but said originals may be properly certified and transmitted by the Clerk of the above-entitled court to the Circuit Court of Appeals for the Ninth Circuit for use on said appeal herein,

at the request of either party hereto.

Dated February 17th, 1914.

B. K. WHEELER,

Solicitors for Complainant.

COOPER & STEPHENSON,

Solicitors for Defendants.

[Indorsed]: Title of Court and Cause. Stipulation. Filed Feb. 17, 1914. Geo. W. Sproule, Clerk.
[115]

Thereafter, on March 6, 1914, an order as to exhibits was made and entered herein, as follows, to wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Complainant and Appellant,

vs.

JENNIE PETERSON (Formerly JENNIE BENEDICT), WILLIAM H. ALBRIGHT and VILLA C. ALBRIGHT,

Defendants and Appellees.

Order [Directing Transmission of Original Exhibits to Appellate Court, etc.].

Upon stipulation of counsel for the respective parties to the above-entitled cause, and upon good cause shown, the presiding Judge of this court, being of the opinion that it is necessary and proper that the original exhibits numbered one and three of complainant, and the original exhibits numbered one, two and three of the above-named defendants, introduced upon the hearing of the above-entitled cause, should be inspected by the Circuit Court of

Appeals in the determination of the appeal herein and should be used upon the appeal as evidence in this cause; and it being further made to appear that owing to the size and nature of said exhibits it is impracticable, if not impossible, to make and insert copies of the same into the record on appeal herein;

Now, therefore, upon motion of counsel, it is hereby ordered that the Clerk of this court certify up under his hand and the seal of this Court, and forward to the Clerk of the Circuit Court of Appeals for this circuit, the above-named exhibits introduced at the hearing in the above-entitled cause, and that said exhibits be forwarded to the said Clerk of said Circuit Court of Appeals at the city of San Francisco, in the State of California, by express or parcel post, said exhibits to be retained in the custody of the said Circuit Court of Appeals until the final disposition of the said appeal herein; and that upon [116] the final disposition of said appeal the Clerk of said Circuit Court of Appeals shall return the same to the clerk of this court in the same manner as received by him.

Dated this 6th day of March, A. D. 1914.

GEO. M. BOURQUIN,
Judge.

[Indorsed]: Title of Court and Cause. Order. Filed and Entered March 6th, 1914. Geo. W. Sproule, Clerk. [117]

That on March 6, 1914, a praecipe for transcript on appeal was duly filed herein, in the words and figures following, to wit: [118]

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

Complainant and Appellant,

vs.

JENNIE PETERSON (Formerly JENNIE BENE-
DICT), WILLIAM H. ALBRIGHT and
VILLA C. ALBRIGHT,

Defendants and Appellees.

Praeipie [for Transcript of Record].

To Messrs. Cooper and Stephenson, Solicitors for
William H. Albright and Villa C. Albright, Two
of the Above-named Defendants and Appellees:

The undersigned, solicitor for complainant and
appellant herein, hereby files and serves upon you its
praeipie in conformity with the rules of court indi-
cating the portions of the record to be incorporated
into the transcript on the appeal herein, and which
said portions of said record you are hereby notified
the said complainant and appellant will incorporate
and include in the record on appeal.

Said portions are as follows, to wit:

1. The judgment-roll, or final record in said cause.
2. Order appointing Dudley Crowther special ex-
aminer to take the testimony in said cause and report
the same to this court.
3. Stipulation of counsel for the parties to the
above-entitled cause consenting to the testimony
being taken in shorthand by Dudley Crowther and
reduced to writing without having the witnesses sub-
scribe thereto, and certified by him as to its correct-
ness.

3a. Notice of settlement of the proposed statement of record of evidence on appeal.

4. Statement of evidence prepared in narrative form in pursuance [119] to the rules of court, and certified to by the Judge of said court as a correct, true and properly prepared narrative of the evidence.

5. Copy of the appeal and allowance thereof by the Court, and assignment of errors accompanying the same.

6. Citation on appeal and admission of service of the same by the defendants and appellees Albrights, and acceptance of service of citation on appeal and notice of settlement of the proposed statement of the evidence and waiver of service by the defendant and appellee Jennie Peterson.

7. Stipulation of counsel that original exhibits may be transmitted to the clerk of the Circuit Court of Appeals for this circuit on the appeal herein.

8. Order of Court directing the clerk to certify and transmit such exhibits.

9. Order extending the time for completing and transmitting the record on appeal herein to the Circuit Court of Appeals.

B. K. WHEELER,

United States Attorney, District of Montana.

Service of the foregoing praecipe and receipt of a copy thereof this 6th day of March, 1914, is hereby admitted and acknowledged.

COOPER & STEPHENSON,

Solicitors for Defendants and Respondents W. H. Albright and Villa C. Albright.

[Indorsed]: Title of Court and Cause. Praecipe.
Filed March 6, 1914. Geo. W. Sproule, Clerk.
[120]

Thereafter, on March 6, 1914, an order extending time to file record on appeal was entered herein as follows:

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,
Complainant and Appellant,
vs.

JENNIE PETERSON (Formerly JENNIE
BENEDICT), WILLIAM H. ALBRIGHT
and VILLA C. ALBRIGHT,
Defendants and Appellees.

**Order [Extending Time to March 9, 1914, to Prepare,
etc., Record on Appeal].**

Upon good cause shown, it is hereby ordered that complainant and appellant in the above-entitled cause, may have twenty days in addition to the time allowed by the rules of the court within which to have prepared and certified up to the Circuit Court of Appeals the record on appeal herein.

Dated this 6th day of March, A. D. 1914.

GEO. M. BOURQUIN,
Judge.

[Indorsed]: Title of Court and Cause. Order.
Filed and entered Mar. 6, 1914. Geo. W. Sproule,
Clerk. [121]

Thereafter, on April 6, 1914, an order granting further time to file record on appeal was duly entered herein, as follows, to wit:

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

Complainant and Appellant,

vs.

JENNIE PETERSON (Formerly JENNIE
BENEDICT), WILLIAM H. ALBRIGHT
and VILLA C. ALBRIGHT,

Defendants and Appellees.

**Order [Extending Time to April 8, 1914, to Prepare
etc., Record on Appeal].**

Upon good cause shown, it is hereby ordered that complainant and appellant in the above-entitled cause, may have thirty days in addition to the time heretofore granted within which to have prepared and certified up to the Circuit Court of Appeals the record on appeal herein.

Entered in open court April 6th, 1914.

GEO. W. SPROULE,

Clerk. [122]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 123 pages, numbered consecutively from 1 to 123, inclusive, is a true and correct transcript of the pleadings, process, orders and decree, assignment of errors and approved statement of the evidence, and other proceedings had in said cause, and of the whole thereof, as appears from the original files and records of said court in my possession as such Clerk; and I further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify that I herewith transmit all the original exhibits in said cause, pursuant to stipulation of counsel and the order of the court, to wit; Complainant's 1, 2 and 3 and Defendants' 1, 2 and 3.

I further certify that the costs of the transcript of record amount to Twenty-three 30/100 (\$23 30/100) Dollars, and have been made a charge against the United States.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 27th day of April, 1914.

[Seal]

GEO. W. SPROULE,
Clerk. [123]

[Endorsed]: No. 2414. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Jennie Peterson (Formerly Jennie Benedict), William H. Albright and Villa C. Albright, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Received and filed April 30, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

UNITED STATES OF AMERICA,

Appellant,

VS.

JENNIE PETERSON, (Formerly Jennie
Benedict), WILLIAM H. ALBRIGHT
and VILLA C. ALBRIGHT,

Appellees.

BRIEF OF APPELLANT.

BURTON K. WHEELER,

United States Attorney.

FRANK WOODY,

Assistant U. S. Attorney.

NAEGELE PRINTING CO., HELENA, MONT.

Filed

OCT 10 1914

F. D. Monckton,

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

UNITED STATES OF AMERICA,

Appellant,

vs.

JENNIE PETERSON, (Formerly Jennie
Benedict), WILLIAM H. ALBRIGHT
and VILLA C. ALBRIGHT,

Appellees.

BRIEF OF APPELLANT.

STATEMENT OF CASE.

This is an appeal from the decree entered by the District Court of the United States for the District of Montana on the 14th day of January, 1914, in favor of the appellees and against the appellant and dismissing appellant's bill of complaint (Tr. p. 48.)

The suit in which said decree was entered was brought by appellant for the purpose of having cancelled and set aside on the ground of fraud a patent

for lands theretofore issued to Jennie Peterson, then named and known as Jennie Benedict, one of the defendants therein, the bill of complaint having been filed on December 9, 1911. The bill of complaint (Tr. pp. 2 to 28) alleges in substance that the appellant was on or prior to the 19th day of July, 1901, the owner in fee of certain mineral lands, situated in the state and district of Montana; that some time prior to the 11th day of July, 1901, the defendant, Jennie Peterson, then named and known as Jennie Benedict, and William A. Albright entered into an unlawful agreement, whereby said Jennie Peterson was to enter said lands and acquire title thereto as a homestead under the provisions of section 2289 Revised Statutes of the United States, for the use and benefit of the appellee, William H. Albright, the said appellee, William H. Albright to pay all expenses in connection with such entry and the acquiring of the title to said lands by the defendant, Jennie Peterson, and the land office fees in connection therewith, the purchase price for said lands and the expenses of making the necessary improvements thereon, and the defendant, Jennie Peterson, to convey said lands to appellee, William H. Albright, after title was acquired thereto; that pursuant to said unlawful agreement the defendant, Jennie Peterson, then named and known as Jennie Benedict, entered said land as a homestead by making and filing in the United States land office at Helena, Montana, her application to enter said lands, together with a homestead affidavit and

a non-mineral affidavit, and thereafter amended said homestead entry and made final proof thereon, and after paying the purchase price therefor, with money belonging to William H. Albright, received from the officers of the land office a final receipt and final certificate, and thereafter a patent was issued to her by the United States to said lands; that thereafter, at the request of the appellee, William H. Albright, she conveyed said lands by deed to the appellee, Villa C. Albright, the wife of the appellee, William H. Albright; that said lands were mineral in character and said fact was known to the defendant, Jennie Peterson, and the appellee, William H. Albright, at the time said unlawful agreement was entered into; that the filing fees paid on said entry, the personal expenses of the defendant, Jennie Peterson, and her final proof witnesses in connection with said entry and final proof, the costs of making improvements on said lands, and the purchase price paid therefor were all paid and furnished directly by or through agents of the appellee, William H. Albright, in pursuance of said unlawful agreement; that the statements contained in said non-mineral affidavit and said homestead affidavit and said final proof depositions of the defendant, Jennie Peterson, and her two final proof witnesses, were false and fraudulent, and known to be false and fraudulent by the said defendant, Jennie Peterson, and the appellee, William H. Albright, at the time the same were made and filed, and that the same were made and filed for

the purpose of deceiving the officers of the United States and fraudulently obtaining title to said lands for the benefit of the appellee, William H. Albright, and that the land office officers, believing said statements to be true, were mislead and deceived thereby and allowed said entry to be made, accepted said final proof, issued said final receipt on said final proof, and that patent from the United States therefor followed; that when said lands were conveyed by the defendant, Jennie Peterson to the appellee, Villa C. Albright, the purchase price therefor was paid by the appellee, William H. Albright, out of his own money; that the title then taken and now held by the appellee, Villa C. Albright, was taken and is now held by her as trustee for the appellee, William H. Albright, and that at the time of such purchase from the defendant, Jennie Peterson, the appellee, Villa C. Albright, knew all of the facts in connection with the acquiring of the title to said lands by said defendant, Jennie Peterson, and that the same was acquired by fraud.

The appellees in their joint and several answer filed February 17, 1912 (Tr. pp. 31 to 42) in substance admit the ownership by the United States of said lands as alleged in the bill of complaint; deny that said lands were mineral and allege that they were at all times non-mineral; deny that the defendant, Jennie Peterson, and the appellee, William H. Albright, either for himself or on behalf of the defendant, Villa C. Albright, entered into any agreement or contract of any kind in regard to the

entry or acquiring title to said lands by the defendant, Jennie Peterson; deny that either said entry or said final proof was made by the defendant, Jennie Peterson, or that the title was acquired to said lands by her, or that the same was conveyed to the appellee, Villa C. Albright, in pursuance of any agreement of any kind between the defendant, Jennie Peterson, and the appellee, William H. Albright; deny that the filing fees on said entry, or the personal expenses of the defendant, Jennie Peterson, or of her final proof witnesses, in connection with said entry and final proof, or the purchase price paid the United States for said lands, or the costs in making improvements on said lands, were paid, either directly or indirectly, by the appellee, William H. Albright, and allege that the same, and all thereof, were paid by the defendant, Jennie Peterson, out of her own money; deny that any of the statements contained in any of the affidavits or depositions made and filed in connection with said entry and final proof were false or fraudulent, and allege that if any of said statements were false and fraudulent neither of the appellees, William H. Albright or Villa C. Albright, ever at any time had any knowledge thereof; allege that the defendant, Villa C. Albright, purchased said lands from the defendant, Jennie Peterson, in good faith, paying the sum of \$800.00 therefor.

To the joint answer of the appellees the appellant on the 17th day of February, 1912, filed its reply (Tr. p. 43). On the 22nd day of March, 1912,

an order pro confesso as to the defendant, Jennie Peterson, was duly filed and entered (Tr. pp.46 and 47). On April 11, 1912, an order was duly made appointing a special examiner to take the testimony in said cause and report the same to the court (Tr. p. 51), and thereafter said special examiner took such testimony and reported the same to the court (Tr. pp. 54 to 119). Said testimony having been duly considered by the court, said court on the 18th day of August, 1913, duly rendered and filed its decision and opinion in said cause (Tr. pp. 49 and 50), and on the 14th day of June, 1914, a decree was duly made and filed in said cause in favor of the appellees and against the appellant and dismissing said bill of complaint (Tr. p. 48).

ASSIGNMENT OF ERRORS.

With the petition for appeal the following assignment of errors were filed (Tr. pp. 123 and 124).

1. The court erred in finding that the evidence taken in said cause at the hearing thereof was insufficient to sustain the allegations of the bill of complaint therein.

2. The court erred in ordering a decree herein in favor of the defendants and against the complaint and dismissing the bill of complaint.

3. The court erred in entering a decree herein in favor of the defendants and against the complainant and dismissing complainant's bill of complaint.

ARGUMENT.

As the appellant contends that the evidence taken by the special examiner was sufficient to sustain the allegations of its bill of complaint, we shall only take up and consider the first specification of errors assigned that “the court erred in finding that the evidence taken in said cause at the hearing thereof was insufficient to sustain the allegations of the bill of complaint therein,” it naturally following that if the court did so err then, error was also committed by the court in ordering and entering the decree dismissing appellant’s bill of complaint as specified in the second and third assignment of errors.

Before the special examiner evidence was introduced on behalf of the appellant for the purpose of proving the allegations of its bill of complaint to the effect,

First: that said land was mineral in character and that said fact was known to the defendant, Jennie Peterson, and the appellee, William H. Albright, at the time the entry was made by the defendant, Jennie Peterson;

Second: That the entry of said land, the final proof thereof and the title acquired thereto by the defendant, Jennie Peterson, was for the purpose of perpetrating a fraud upon the appellant and fraudulently acquiring title to said land for the benefit of the appellee, William H. Albright, in pursuance of an unlawful agreement made between

the defendant, Jennie Peterson, and the appellee, William H. Albright;

Third: That the appellee, Villa C. Albright, knew of the fraud perpetrated upon the appellant by the defendant, Jennie Peterson, and the appellee, William H. Albright, in connection with the acquiring of the title to said lands by the defendant, Jennie Peterson, and was not an innocent purchaser thereof in good faith for a valuable consideration.

We shall take up and consider the evidence in the order in which the same is contained in the bill of complaint.

CHARACTER OF LAND.

The only evidence in regard to the mineral or non-mineral character of the land was that of Frank C. Whittaker, a witness for the appellant (Tr. pp. 85 to 87 and 90 and 91), the appellee, William H. Albright (Tr. p. 193), and O. C. Mortson, a witness for the appellees (Tr. pp. 117-118). We at this time admit that the evidence introduced on the part of the appellant was and is insufficient to sustain the allegations of the bill of complaint that the land was mineral in character, and admit that the land was at the time of such entry subject to entry as a homestead under the provisions of section 2289 Revised Statutes of the United States.

THE CONTRACT OR AGREEMENT.

We most earnestly contend that the evidence introduced on behalf of the appellant, in connection with the admitted facts and circumstances,

proves conclusively that the defendant, Jennie Peterson, and the appellee, William H. Albright, prior to the entry of said lands by the defendant, Jennie Peterson, entered into an unlawful contract or agreement, by the terms of which the defendant, Jennie Peterson was to enter said lands and acquire title thereto as a homestead for the benefit of the appellee, William H. Albright, and that in pursuance of such unlawful contract or agreement the defendant, Jennie Peterson, entered and acquired title to said lands, and thereafter conveyed the same to the appellee, Villa C. Albright, for the benefit of the appellee, William H. Albright. The evidence introduced on behalf of the appellant was in substance as follows:

The defendant Jennie Peterson, testifying on behalf of the appellant, said that when she was about eighteen years of age and working for the appellees, Albright's, several parties were taking up homesteads for the appellee, William H. Albright, and she said in a general conversation that when she got old enough she would like to take up a ranch; that she would take up a homestead for Mr. Albright (Tr. p. 56); that she had worked for the Albrights for more than two and one-half years before taking up her homestead; not continuously, but a few months each spring; that just prior to filing on her homestead she had been living with her mother in Michigan (Tr. p. 56); that she had some correspondence with appellee, William H. Albright, and in one letter he wrote that he understood she

wanted to come west again, and that as she was old enough she could file on a homestead and that he had a piece of land in view and if she decided to come to let him know and that he would send a ticket; that she answered his letter and he sent a ticket to her at Crosswelle, Michigan; that she used the ticket, leaving Michigan on July 5, 1901; that when she arrived in Great Falls she went to the Great Falls Hotel and was met by Mr. Albright in that town. When she met him he told her the papers were ready in Prior's office, and she went there and filed on her homestead; that she had not been on the land and did not know where it was located; that she did not prepare the papers, or have anything to do with preparing them; that she did not pay Prior and did not know who did, and that she did not pay the filing fees and did not know who did (Tr. p. 57); that she and Mr. Albright discussed what she was to receive for the land when she proved up on it. When she filed on the land she was to commute it and prove up at the end of fourteen months, and was to receive \$640.00, the same as the rest received for their homestead rights, but if she kept it for five years he said he might do a little better by her because it would not cost so much to prove up on it. At that time she was in Great Falls, and made her entry, he told her she was to receive the same as the rest received that took up homesteads and that she understood that was \$640.00; he was to pay all expenses during the life of the entry (Tr. p. 58). After making the entry,

she worked for Mr. Albright some times and some times lived on her homestead. She never had anything to do with building the house (Tr. p. 58). She lived on the land the most of the summer of 1902; there was not a week that she was not there. She was there for two weeks at a time steady. She was working for Mr. Albright during the time (Tr. p. 58). When she lived upon the land he used to furnish her with provisions; that was part of the agreement made at the time she filed on the land; he was to pay all expenses (Tr. p. 58). During the time she lived on the land and during the life of the entry, she never paid out anything for expenses in the way of improvements (Tr. p. 59). Mr. Quick was one of her witnesses and she went over for him at Mr. Albright's request. She did not pay the expenses of her witnesses. Mr. Albright gave her money to pay Br. Benson, the other witness; that was in Great Falls (Tr. p. 59). She does not know where the final proofs were prepared, or who made them; she had nothing to do with them. She does not know at whose request they were prepared and had nothing to do with them (Tr. p. 60). She did not pay the filing fees, or the fees on final proof (Tr. p. 60). She made a commuted proof and Mr. Albright gave her the money; she did not furnish the money (Tr. p. 60). After her final proof receipt came, she transferred it to Mr. or Mrs. Albright; she did this in Great Falls in Prior's office (Tr. p. 60). She got \$600.00 for the land, \$500.00 in a note of Mr. Albright and \$100.00 in cash or by

check. The note was signed by W. H. Albright and he did not sign as agent for Villa C. Albright (Tr. p. 60). The note was paid the next May by Mr. Albright to Mr. Peterson (Tr. p. 61). She had been in Michigan about two years before returning to Montana in the summer of 1901; Mr. Albright wrote to her and told her if she wanted to take up a homestead for him she could come back and they would give her work and she could prove up on it. She was certain he said "If I still wanted to take up a homestead for him," and sure he used the words "for him" (Tr. p. 62). The letter was in Mr. Albright's handwriting (Tr. p. 63). Afterwards she received a letter saying he would send her a ticket to come to Montana on and later he sent her the ticket. He said she could work for Mrs. Albright, and she went to work right after Christmas and worked for them the greater part of that winter and the following spring and summer (Tr. p. 63). She told Mr. Albright she would turn the ranch over to him on the same terms he was giving the rest. She made a verbal agreement with Mr. Albright (Tr. p. 65). When she arrived from Michigan she went to the Great Falls Hotel; she met Mr. Albright on the street corner and talked with him there in Great Falls the day after she arrived. The first thing Mr. Albright said to her was that he had the homestead papers ready to file and she could file on a homestead at once (Tr. p. 65). She had been over the country before on horse back when she was younger, but did not know the country; it was not

familiar to her at all (Tr. p. 65). Mr. Albright told her at that time that she could come back to work later, and she went to work for him later on (Tr. p. 65). He told her at that time he had the papers all ready in Prior's office and he went there with her (Tr. p. 65). She met him in the morning and they went to the office in the afternoon (Tr. p. 65). He told her he would fix the price for her homestead all right and would give her the same as the rest; that was all that was said. She had not asked him what price he would pay, but understood it to be \$640.00. She wanted to take up the homestead because she thought it would be a nice way to make money. He did not give her to understand that when the homestead was proved up he would buy if she wanted to sell; it was his—she was to prove up for him (Transcript p. 66). The arrangement was not made with Mrs. Albright; it was made with Mr. Albright. She did not do any of the business—he did (Tr. p. *7). When she made her commuted proof in the land office, Mr. Albright was in town (Tr. p. 68). The gentleman before whom she made the final proof read the questions and she answered them just as Mr. Albright had told her to; he furnished her with a copy of the questions, or told her the questions they would ask, and she answered them just as she was told to (Tr. p. 68). She took up the land for her own benefit—for the benefit of her pocket book—for the money she could get, as she had already agreed to sell it to Mr. Albright (Tr. p. 68). She knew better than to tell the man

in the land office anything about the arrangement she had with Mr. Albright, as Mr. Albright had told her not to say anything about it (Tr. p. 68).

The evidence of the witness, Jennie Peterson, was corroborated by the evidence of appellant's witnesses Frank C. Whittaker, Mary Elizabeth Gustafson and Charles Gustafson. The witness Whittaker testified (Tr. pp. 75 to 93) in substance as follows: That he had known the appellees, William H. Albright and Villa C. Albright for sixteen or eighteen years; that he knew Mrs. Peterson and Charles Gustafson; that he was acquainted with the Jennie Peterson homestead and first knew it about 1901, when Mr. Albright talked to him about it and about getting her to take up some land. He had his first conversation about Jennie Peterson with Mr. and Mrs. Albright about April, 1901. The three of them talked it over and thought it would be a good thing to get her to come out and take up land for Mrs. Albright. Mr. Albright thought it would be a good thing and had no objections and they could send for her. They had these conversations in April, May and June. Jennie Peterson, then Jennie Benedict, was then in Michigan (Tr. p. 75). Mr. Albright suggested that he would send her a ticket to come out with and money for expenses, but first he would ask her if she would come. She said she would and he wanted to know if it was all right with me, and the witness said that he told him it was all right. The witness talked with Mrs. Albright and she said that it would be all right to

have her come and keep books and take up some land. Jennie Peterson, then Jennie Benedict, came out from Michigan, and Mr. Albright met her in Great Falls and had a description for her to file on. Before that Mr. Albright and Whittaker had staked and measured up the land with a compass; took a spirit level and paced off for about as far as they thought was 160 acres and put up three or four rocks in place so they would know about where it was (Tr. p. 76). He knows that Mrs. Peterson took up this homestead for Mrs. Albright because Mr. and Mrs. Albright and the witness talked about it. Mr. Albright said he had to have it taken up and signed over to Mrs. Albright so that it would clear him if there was any difficulty about the government getting after him. The witness knows that to be a fact and talked about it and they talked to one another. The three of them had conversations and talked about it; they said Mrs. Peterson, then Jennie Benedict, was to receive \$750.00 when she got her patent; there was a difference made her than some other people who had taken up land and sold to Mrs. Albright. Before she got patent she was to receive \$640.00, \$440.00 clear and he was to furnish the money to commute (Tr. p. 76). If she should stay on the land five years and did not commute, he would give her \$750.00 (Tr. pp. 76 and 77); Mr. Albright built the improvements. Mrs. Albright told the witness that they were paying for the improvements, the same as they paid for the rest of them (Tr. p. 77). After she made her

filing and until she submitted her final proof of the same, Jennie Peterson was working for Mr. and Mrs. Albright, keeping books at the quarry, and that the witness thinks she went back to Michigan once on a visit (Tr. p. 77). She did not pay any of the expenses of filing (Tr. p. 77). Five or six weeks before she made her final proof she went up there and took a few things. Prior to that time Mr. Albright would give her a horse from the quarry and some grub and she would go up and stay over night. The witness knows that when she went up there Mr. and Mrs. Albright told her to take provisions out of the kitchen and at one time they sent the witness up there so he could be a witness and he took some provisions out of Albright's kitchen (Tr. pp. 77 and 78). Mr. Albright made the agreement with Jennie Peterson before she made her filing by writing to her in Michigan. Mr. and Mrs. Albright and the witness talked about getting Jennie Peterson to take up land and Mr. Albright said he would write and ask Jennie Peterson, then Jennie Benedict, if she wanted to come out and keep books for him, and if so, he would send her a ticket and money for expenses and would meet her in Great Falls and show what land to file on. Mrs. Albright said that was all right. I know he showed me a letter or two that he got from Mrs. Peterson saying that she would take up the land for him. The witness did not know whether they had any other agreement or not. The letter said that she would take it up for Mr. and Mrs. Albright, both of

them (Tr. p. 89). He heard the conversations between Mr. and Mrs. Albright and himself about Jennie Peterson taking up the land (Tr. pp. 89 and 90).

The witness Mary Elizabeth Gustafson testified (Tr. pp. 92 to 94) in substance that she first came to the quarry at Albright in 1903, and became acquainted with the appellees (Tr. p. 93); that Jennie Peterson was then in Michigan visiting her parents and that Mr. Albright said that he was expecting her (Tr. p. 94). She returned in March (Tr. p. 94); Mr. Albright said to the witness just before Jennie Peterson returned in March that they had let that girl take up a homestead for them just to help out by working in the office and holding the land there, so it gave her a chance to make money in two places (Tr. p. 94).

The witness Charles Gustafson testified (Tr. p. 95 and 96) in substance, that he was acquainted with Mr. and Mrs. Albright and with Jennie Peterson, who was formerly Jennie Benedict; that when he first knew Jennie Peterson she was living at Albright keeping books for Mr. Albright at the quarry and attending the postoffice and store; that Jennie Peterson was working for Mr. Albright when she made her filing on the land; that witness had a conversation with Mr. Albright in which he told witness that Jennie Peterson was coming out there to take up land for him; this conversation was before she filed on the land; it was in April or May and she filed in July. Mr. and Mrs. Albright told the

witness that Jennie Peterson had taken up the land for Mr. Albright (Tr. p. 95). It was in 1901 that Mr. Albright said Jennie Peterson was coming up there to file on the land for him; she was coming from Michigan at that time; she came in the summer of 1901; Mr. Albright did not tell the witness what land she was going to file on (Tr. p. 96). Mrs. Peterson afterwards told witness in the fall of 1901 that she had taken up the land for Mr. Albright (Tr. p. 96).

The evidence of witnesses, Peterson, Whittaker, Mary Elizabeth Gustafson and Charles Gustafson was plain, definite and consistent, leaving nothing to supposition or surmise, and was strongly corroborated by the admitted facts and circumstances. First we have the evidence of witness Whittaker to the effect that in conversations between the witness Whittaker and the appellees Mr. and Mrs. Albright in April, May and June, 1901, they discussed the matter of having Jennie Peterson, then Jennie Benedict, come out to take up a homestead for the appellees; that it was agreed between them that if she was willing to do so, they would send her the ticket to come out from Michigan and money to pay her expenses, and that while she was holding down the homestead she might work for appellees keeping books, and that after some correspondence between appellees and Jennie Peterson, they sent her a ticket and she came out; that in these conversations it was understood between all of them that she was to take up the homestead for appellees, and

when she acquired title, was to convey it to them and was to receive \$640.00 if she commuted, and \$750.00 if she stayed on it five years; that before Jennie Peterson came out from Michigan, witness Whittaker and appellee William H. Albright went on the land on which she was to file and staked out and measured it off so that they would know where the corners were; that when Jennie Peterson came out from Michigan, appellee William H. Albright met her and she made her filing; and that from the time she made her filing and until she proved up, she worked for appellees two-thirds of the time.

Then we have the evidence of the witness Charles Gustafson to the effect that before Jennie Peterson filed on the land, the appellee William H. Albright told him in April or May before the filing was made that Jennie Peterson was coming out there to take up land for him.

Then we have the evidence of the defendant, Jennie Peterson, that she knew the conditions existing in that section of the country; that she had worked for appellees for two and one-half years before she made her filing; that while working for appellees and before going to Michigan, she had often expressed an intention of taking up a homestead for appellees when she was old enough; that while she was in Michigan she had some correspondence with the appellee William H. Albright with reference to her returning to Montana and taking up a homestead for him, and that he sent her a ticket and she came out; that he met her in Great

Falls and she made her filing; that it was agreed between them that she was to get \$640.00 if she commuted her entry and that he would do better by her if she stayed on it for five years; that he was to pay all of the expenses during the life of the entry; that he had selected the land and had the description she was to file on and that she had never seen it; that after she had made the entry she went to work for appellees after Christmas and worked for them the balance of that winter and the following spring and summer; that she did not pay any of the expenses of entry or final proof, or of making the improvements; that all of these expenses, including the purchase price of the land, was paid by Mr. Albright, and that she made the entry for his benefit and was to convey it to him after she had obtained title.

Then we have the evidence of the witness Mary Elizabeth Gustafson to the effect that at one time when Jennie Peterson was on a visit to Michigan and just before her return to Montana, the appellee, William H. Albright, told the witness that Jennie Peterson had been in Michigan and he was expecting her back, and that she had taken up a homestead for the appellees while she was working for them.

Then we have the following admitted facts and circumstances that Jennie Peterson, then Jennie Benedict, had worked for the appellees at times covering a period of more than two and one-half years before making the entry; that she was in Michigan

and afterwards returned to Montana and made her entry; that between the making of her entry and the date of making her final proof, she worked for the appellees at various times; that she made her final proof on August 5, 1905, and the land was conveyed to the appellee, Villa C. Albright, on August 28 of the same year; that she never had any dealings whatever in regard to the purchase of the land with Villa C. Albright, but that all of the dealings with reference to the land were had with the appellee, William H. Albright; that the purchase price of the land was paid to her by the appellee, William H. Albright, \$500.00 thereof being a note signed W. H. Albright, and the remainder being partly in cash and partly by a check signed by the appellee, William H. Albright.

From an examination of the opinion of the lower court (Tr. pp. 49-50), we are led to the conclusion that the court based its decision wholly and entirely upon the evidence of the defendant Jennie Peterson and the appellee William H. Albright and failed to give any consideration whatever either to the evidence of the corroborating witnesses, Whittaker and the two Gustavsons, or to the admitted facts and circumstances which corroborated the evidence of Peterson.

Taking the evidence of the witness Peterson, the corroborating evidence of the witnesses Whittaker and the two Gustavsons and the admitted facts and circumstances and considering them together as a whole could it have been possible to have made

out a stronger case in favor of the appellant? When an unlawful contract or agreement, of the character alleged in the bill of complaint, is entered into it is not reduced to writing or made openly and publicly, secrecy being essential to the successful carrying out and performance of its terms and therefore, the only manner in which the existence of such a contract or agreement can be proven is by the evidence of one or more of the parties thereto corroborated by the evidence of other witnesses as to facts and circumstances surrounding the entire transaction.

In this case we must believe that the evidence given by the witnesses who testified on behalf of the appellant and the admitted facts and circumstances were true and that an unlawful contract or agreement was entered into between the defendant Peterson and the appellee William H. Albright and that the terms of such contract or agreement were fully carried out and performed by the parties thereto, or else we must believe that these witnesses, conspiring together, concocted an elaborate scheme of false accusation and carried it out with deliberate, preconcerted and harmonious perjury. We can take no middle ground and believe that the witnesses for the appellant were simply mistaken in their evidence because this is not a case where witnesses for opposing parties may give conflicting evidence based on an honest difference of opinion or understanding of facts, but we are compelled to believe either that the evidence of the witnesses for the appellant was true or that each and all of

them intentionally and premeditatedly committed perjury.

It is true that the appellees offered evidence in contradiction of that given by the witnesses for the appellant. The appellee William H. Albright testified in behalf of the appellees (Tr. pp. 96-117): His evidence consisted principally of denials and attempts to corroborate these denials by entries in a time book kept by him while running his quarry, together with statements concerning the hostility of every witness testifying for the appellant. He attempts to negative every thing testified to by the witnesses for appellant and which were contrary to his interests, in fact he "Doth protest too much." Many of the facts and circumstances testified to by the witnesses for the appellant might easily and readily and reasonably have been explained by him but he makes no attempt to give any such explanation, meeting them all by positive denials. He brought in his time book to refresh his recollection, (Tr. pp. 102-103), in regard to the times and dates the defendant Jennie Peterson, and other persons, worked for him at his quarry, and the amounts they drew, and he testified that certain amounts, shown by the time book, were not drawn in cash but were for groceries, supplies, etc. (Tr. p. 103). At the same time he testified that the time book showed nothing but the time and dates they worked and the amounts they were paid, (Tr. p. 107), so that when he testified that certain amounts, shown by the time book to have been paid to Jennie Peterson,

were not paid in cash but were taken out in groceries, supplies, etc., he was testifying from memory alone in regard to all of these numerous small amounts and transactions which had taken place eight or ten years previously. He testified (Tr. pp. 97-98), that some times persons in his employ might come to him in the middle of the month for money and he would give it to them and the balance would be drawn at the end of the month so that there would be two entries for payments received during that month, the two items amounting to the total paid during that month. He further testified that groceries, supplies and every thing received out of the store by any person working for him were all charged in a day book and that the day book was lost (Tr. p. 111). If the time book only showed the time and amounts earned and paid, and the day book was lost, how was it possible for him to testify that eight or ten years before, for instance that in the month of May, 1902, one amount shown by the time book to have been received by Jennie Peterson was for stuff out of the store and another amount received by her during the same month was cash, or that in July, 1904, one amount represented trade and another amount cash (Tr. p. 103)? We desire to call attention to the opinion of the lower court (Tr. p. 50), in connection with this evidence. The court in its opinion finds that the books of the appellee William H. Albright were inconsistent with the evidence of the witness Jennie Peterson that the appellee William H. Albright paid all her

expenses in connection with the land. The Court seems to have understood from the evidence of the appellee William H. Albright that the time book showed that certain amounts were paid to the defendant Peterson in cash and that certain other amounts were paid in groceries, supplies, etc., entirely overlooking the evidence of the appellee William H. Albright to the effect that the time book only showed the actual amounts drawn by the witness Peterson, and did not itself show how the amounts were paid whether in cash or in supplies, etc., and that the appellee William H. Albright was testifying from memory alone when he testified that certain amounts were paid in cash and other amounts in supplies, etc.

The memory of the appellee William H. Albright was exceedingly good, it was clear, definite and distinct in regard to every thing connected with the Jennie Peterson entry, so good in fact, that he could remember every detail in regard to her taking up her homestead (Tr. pp. 100-104), and even how much cash she drew and how much was charged against her for groceries, supplies, etc., although the day book in which such charges were made was lost (Tr. p. 111), and the time book only showed the time she worked and the amounts she drew (Tr. pp. 103 and 107). Is it not somewhat peculiar that he could remember so distinctly every thing connected with the Jennie Peterson entry, even down to the smallest detail, when he could not remember when Gustafson took up his homestead because it was so

long ago, (Tr. p. 97), although it was after Jennie Peterson took up her homestead, or whether or not Jennie Peterson had been in Michigan just before taking up her homestead—it was so long ago (Tr. p. 105)? Is it not also somewhat peculiar that he was able to produce his time book while the day book kept at the same time was lost (Tr. p. 111), and the slips or memorandum which he kept during that time showing the amount of money he owed his wife was also lost (Tr. p. 111)? The lower court in its opinion (Tr. p. 50), seems to lay considerable stress on the fact that the letters and ticket, which the witness Peterson testified to, were lost, failing to take into consideration the fact that of all of the books and memorandum kept by the appellee William H. Albright, all were lost and could not be produced save and except the time book alone.

The appellee William H. Albright, in his evidence, tried to make it appear that every single witness testifying for the appellant was unfriendly to him and testified falsely for the sole purpose of trying to get even with him for some imaginary or fancied wrong. It is possible, of course, that some of the witnesses testifying for the appellant may not have been on the very best terms with the appellee William H. Albright, but, to believe his evidence, each and all of them were not only extremely hostile towards him but were even willing and anxious to perjure themselves if they might harm him. We submit that this evidence of the appellee William H. Albright shows so plainly on its face the purpose

for which it was given that it was and is entitled to no consideration whatever. In this evidence he attacks the witness Whittaker, who testified for the appellant, and would have it believed that Whittaker is somewhat of a notorious character, indolent and worthless and that he never had any use for him and never trusted him (Tr. pp. 102, 104, 110 and 111), yet the evidence of the witness Whittaker (Tr. p. 75), of the appellee William H. Albright (Tr. pp. 104 and 112), and of the appellee Villa C. Albright (Tr. p. 113), shows that the witness Whittaker and the appellee William H. Albright were associated together in business for several years and that very frequently during that time the witness Whittaker slept and took his meals at the Albright home (Tr. pp. 81 and 113), and the appellee Villa C. Albright testified that they were all on very good terms and that when Whittaker would come down with specimens he would stay with them and that he never forced himself upon them (Tr. p. 115). Evidently the appellee William H. Albright felt, that owing to the fact that Whittaker had given very damaging evidence against him, it was necessary to discredit his evidence in some way and that the only way open was to try and show a feeling of hostility on the part of the witness Whittaker and thus provide a motive for the giving of this evidence by Whittaker.

The appellee William H. Albright also testified in regard to the business transactions and relations between himself and his wife, the appellee Villa C.

Albright (Tr. pp. 102, 104, 108 and 116-117). Many of his statements are so ridiculous and absurd it is impossible to believe them to be true and others are partly discredited by the evidence of his wife, the appellee Villa C. Albright (Tr. pp. 115-116). We submit that a careful reading and examination of the evidence of the appellee William H. Albright leads to very serious doubts of his credibility.

The appellee Villa C. Albright also testified for the appellees (Tr. pp. 113-116), but her evidence is practically all negative in character. She denies that she ever had any conversation with either the defendant Jennie Peterson or the witness Whittaker or in the presence of either of them, in regard to Jennie Peterson holding down a homestead for either of the appellees (Tr. pp. 113-114), and never even talked to Jennie Peterson about her homestead (Tr. p. 114). She testified that she was never very friendly with the defendant Jennie Peterson, that they were not on very good terms (Tr. pp. 113-114), yet the evidence is undisputed that the defendant Jennie Peterson worked for the appellees at various times covering a period of eight or nine years beginning with the year 1895 (Tr. p. 100), and up to as late as July, 1904 (Tr. p. 103). If the appellee Villa C. Albright and Jennie Peterson were not friendly, were not on good terms, is it reasonable to believe that the appellees would have employed her to work for them during all those years, and that the appellee Villa C. Albright, knowing that the defendant Jennie Peterson was holding down a home-

stead, would have not at least, casually talked with her in regard to it at some time? The evidence of the appellee Villa C. Albright is not consistent, is not reasonable and leaves the impression that it was given for the sole purpose of corroborating and bolstering up the evidence of the appellee William H. Albright.

Taking the evidence of all of the witnesses for both the appellant and appellees and considering it as a whole, in connection with the admitted facts and circumstances, the only reasonable conclusion that can be arrived at is that an unlawful contract or agreement was entered into between the defendant Jennie Peterson and the appellee William H. Albright, and that the terms of such unlawful contract or agreement were fully carried out and performed when the defendant Jennie Peterson, after entering and acquiring title to said lands, conveyed said lands to the appellee Villa C. Albright, and the court therefore erred in holding that the proof failed.

PURCHASE BY VILLA C. ALBRIGHT.

If there was no unlawful contract or agreement between the defendant Jennie Peterson and the appellee William H. Albright in regard to the entering and acquiring title to said lands then the appellee Villa C. Albright was an innocent purchaser for a valuable consideration for it would make no difference to the appellant whether the purchase price paid to the defendant Peterson was paid out

of the moneys belonging to the appellee Villa C. Albright or whether it was paid out of the moneys belonging to the appellee William H. Albright, but if such an unlawful contract or agreement was entered into between the defendant Peterson and the appellee William H. Albright and the terms thereof were fully carried out and performed the appellee Villa C. Albright was not an innocent purchaser for a valuable consideration if she knew of the existence of such unlawful contract or agreement, or if she did not know of its existence but the purchase price paid to the defendant Peterson was paid out of the moneys of the appellee William H. Albright and the title thereto was taken in the name of appellee Villa C. Albright in which event she would hold the title to said lands as trustee for the appellee William H. Albright.

That the appellee Villa C. Albright did know of the existence of an unlawful agreement or contract, with reference to said lands, between the defendant Peterson and the appellee William H. Albright, we have the evidence of the witnesses who testified on the part of the appellant.

Jennie Peterson testified (Tr. pp. 53-75), in substance, that she knew Mrs. Albright; that Mrs. Albright knew where the witness was working at the time she was holding down her homestead; and that she often spoke to the witness about the land and said that they would have lots of land for the boys (Tr. pp. 58-59); that Mrs. Albright made other statements about the homestead entry of the wit-

ness, sometimes speaking favorably of it and at other times calling it a lot of worthless land (Tr. p. 59); that Mrs. Albright did not hear the agreement made between the witness and the appellee William H. Albright but it was understood that he was to buy the land and Mrs. Albright knew that (Tr. p. 59); that Mrs. Albright made statements to the witness to the effect that the boys would own the land upon that hill or on the bench, that they would have a nice ranch for the boys (Tr. p. 59); that land embraced the homestead of the witness (Tr. p. 59); that Mrs. Albright spoke about the land the witness was holding in general with the other as a lot of worthless land and other times she would say that she was glad they were getting so much land for the boys (Tr. p. 67); that there was no discussion other than in a general way that my land belonged to them, but it was an understanding, she knew as well as all of them knew (Tr. p. 67); that the bargain was not made with Mrs. Albright it was made with Mr. Albright; she didn't do any business, he did (Tr. p. 67); that the witness and Mrs. Albright never had any discussion as to the price or the obligations of the witness to turn over the land, but Mrs. Albright knew it all right because it was common conversation down there (Tr. p. 67); that between the witness and Mrs. Albright it was understood perhaps about the witness not being a rancher for long, that Mr. Albright or the boys would own the land pretty soon, they would own the whole country up there pretty soon (Tr. p. 67).

The witness Frank C. Whittaker testified (Tr. pp. 75-93), in substance, that he had his first conversation with the Albrights in regard to Jennie Peterson in April, 1901; the three of them talked it over and thought it would be a good thing to get her to come out and take up land for Mrs. Albright; she thought it would be a good thing and had no objections and they could send for her (Tr. p. 75); Jennie Peterson said she would come and Mr. Albright wanted to know if it was all right with the witness and the witness said yes and talked with Mrs. Albright and she thought it would be all right to have her come out and keep books and take up some land (Tr. p. 76); the witness knows that Jennie Peterson, then Jennie Benedict, took up the homestead for Mrs. Albright because Mr. and Mrs. Albright and the witness talked about it (Tr. p. 76); Mr. and Mrs. Albright said that Jennie Peterson was to receive \$750. when she got her patent (Tr. p. 76); Mr. and Mrs. Albright told the witness that they were paying for the improvements the same as for the rest of them (Tr. p. 76); that when Jennie Peterson went up to her homestead a few weeks before she was to make final proof Mrs. Albright told her to take some provisions out of the kitchen (Tr. p. 77-78); Mr. and Mrs. Albright sent the witness up one time so that in case there was any trouble he could be a witness that he saw her living on the land and he took up some provisions which he got out of the Albright's kitchen (Tr. p. 78); the witness never heard any conversation between Mrs.

Peterson and Mrs. Albright as to the bargain, but he did hear them talking about Jennie Peterson going up and staying on the land (Tr. p. 90); that is was the understanding that she was to hold down a homestead for Mrs. Albright (Tr. p. 90).

Taking up this evidence in its logical order we have the evidence of the witness Whittaker that Jennie Peterson being in Michigan the witness and the appellees discussed the matter of having Jennie Peterson, then Jennie Benedict, come out and take up a homestead for Mrs. Albright and finally agreed that they would do so. Then the evidence of the defendant Jennie Peterson that after making her homestead filing she frequently talked with Mrs. Albright about it and that Mrs. Albright knew that it was taken up for Mr. Albright and that when Jennie Peterson acquired title to the lands it was to be conveyed to Mr. Albright; that after the filing was made Jennie Peterson when going up to her homestead to stay for a few weeks before making her final proof she took provisions out of the Albright's kitchen. The evidence of the witness Whittaker that after Jennie Peterson had made her filing Mrs. Albright told the witness that they were paying for the improvements on the Jennie Peterson homestead the same as the rest of them; that when Jennie Peterson went up to her homestead the last time, a few weeks before she made final proof, Mrs. Albright told her to take some provisions out of the kitchen, and that Mr. and Mrs. Albright sent the witness Whittaker up one time so that he

could be a witness that he had seen Jennie Peterson living on her homestead and that at that time he took some provisions out of the Albright's kitchen.

To meet this evidence on the part of the appellant we have the evidence of the two appellees. The appellee William H. Albright testified (Tr. pp. 96-113), that he never entered into any contract or agreement of any kind with the defendant Jennie Peterson in regard to the land; that he did not pay the filing fee or purchase price paid to the land office; that he did not pay for making the improvements and did not pay the expenses of Jennie Peterson and her final proof witnesses in connection with the entry and final proof, which evidence we have already reviewed at some length. The appellee Villa C. Albright testified (Tr. pp. 113-116), that she never had any conversation with the defendant Jennie Peterson about her holding down a homestead for either Mr. or Mrs. Albright; that she did not think there was any agreement between Jennie Peterson and her husband that she was holding the homestead for Mr. Albright; that the appellee never had any conversation with Jennie Peterson or any one else in which they spoke of her holding the homestead for either herself or her husband William H. Albright (Tr. p. 113); that she never had any conversation in the presence of the witness Whittaker in which she admitted that people were holding down homesteads for them (Tr. p. 114); that Jennie Peterson, then Jennie Benedict was working for them, the Albrights and that she made their place

her headquarters living in their house (Tr. p. 114); that she was not very friendly with Jennie Peterson and never talked with her about her homestead or what she was going to do with it (Tr. p. 114).

The evidence of the appellee William H. Albright was in line with all of his other evidence, merely negative in character, without attempting to give any reasonable explanation of matters which might have been explained. The evidence of the appellee Villa C. Albright is not only negative in character but much of it wholly unreasonable. She testified that she knew Jennie Peterson was holding down a homestead, and that during a portion of the time she was working for the appellees and going up occasionally to stay over night on her homestead. Now it would have been the most natural thing in the world for them to have talked about Jennie Peterson's homestead and discuss what she was going to do with it after she got her title, yet, according to Mrs. Albright's evidence, the matter was never even casually mentioned between them, never even mentioned at all. With two women living under the same roof, associated together in their work more or less, as the evidence shows Mrs. Peterson and Mrs. Albright were, it is utterly impossible to believe the evidence of Mrs. Albright to be true that the matter of the homestead was never even mentioned between them, and to our minds this evidence of Mrs. Albright tends to discredit her entire evidence to such an extent that none of it should be given any weight.

We therefore submit that the evidence discloses clearly and plainly that the appellee, Villa C. Albright, not only knew at the time the deed was executed by Jennie Peterson and the title to the property was placed in her name, that it was in pursuance of an unlawful contract or agreement between the defendant Jennie Peterson and the appellee William H. Albright, but that she also knew at the time Jennie Peterson made her homestead filing that it was made in pursuance of such contract or agreement.

That the property was purchased from the defendant Jennie Peterson with moneys belonging to the appellee William H. Albright there can be no doubt whatever. The defendant Jennie Peterson testified that when she transferred the land to Villa C. Albright the appellee William H. Albright told her to have the papers made out to Villa C. Albright as he desired the property in her name for a while yet, all his property in her name (Tr. p. 60); that she got \$600 for the land, \$500 in a note signed by W. H. Albright and \$100. either in cash or in a check; the note was signed by W. H. Albright and he did not sign as agent for Villa C. Albright; that she never had any dealings with Mrs. Albright and that none of the business was in Mrs. Albright's name except the taking of the deed; the note was paid the next May by Mr. Albright (Tr. p. 60); that at the time the purchase was made by Mr. Albright she was paid with a note for \$500. and the balance in cash or checks; that the witness could

not recall the details but remembers distinctly the note; it was in September or the last of August, 1905 (Tr. p. 67); Mr. Albright did not give her the explanation that Mrs. Albright was away and for this reason asked her if she was willing to take a note; Mr. Albright never considered Mrs. Albright when he wanted to do business and Mr. Albright was the only one that did business (Tr. p. 69).

The appellee William H. Albright testified that he signed the note to Mrs. Peterson for her homestead because Mrs. Albright did not like Mrs. Peterson and would not sign the note (Tr. p. 102); that he paid Mrs. Peterson \$800. for the land, \$150. in cash, \$150. by check, and \$500. in a note signed by him, and that Mrs. Albright reimbursed and repaid him this money (Tr. p. 102); that they kept their money separate but that he managed all of the business (Tr. p. 102); that Mrs. Albright was in town but that he signed the check and the note because Mrs. Albright was not on very good terms with Mrs. Peterson and would not sign them (Tr. p. 108); that he told Mrs. Albright that he was going to buy the land in her name (Tr. p. 108); that when he married Mrs. Albright she had no property except \$50; that the property was bought in her name for protection; that she leased the property to the B. and M. Smelter and that he closed the transaction without consulting her; that some times he asks her advice but not very often (Tr. p. 117).

The appellee Villa C. Albright testified that she did not remember giving Mr. Albright a check to

pay the Peterson note with; that she allowed Mr. Albright to handle her money as he saw fit (Tr. p. 114); that she did not sign the Peterson check or note; that the first check to Jennie Peterson was not signed by her and she knew nothing of the transaction until he asked her to sign the note and she would not because she did not like Mrs. Peterson (Tr. p. 115).

This evidence shows that at the time the deed was executed and the purchase price paid over to Jennie Peterson the entire transaction was between Jennie Peterson and the appellee William H. Albright and that his wife Villa C. Albright took no part in it, Villa C. Albright testifying positively that she knew nothing whatever about it until her husband asked her to sign the note. It further shows that a portion of the purchase price was represented by a note and a portion by a check and that both were signed by the appellee William H. Albright.

The appellees attempt to explain the signing of the note by William H. Albright by saying that Mrs. Albright did not like Jennie Peterson was not on good terms with her. This explanation is decidedly flimsy. If the purchase was being made for Villa C. Albright and eventually the money was to come out of her pocket what difference could it make to her whether or not she was friendly or unfriendly with Jennie Peterson or whether she was or was not on good terms with her, so far as signing the note was concerned? Her feeling towards

the defendant Jennie Peterson had nothing whatever to do with her signing the note. If she signed it she expected to have to pay it when it became due and if she did not sign it but her husband signed it for her she expected to pay it just the same. The truth of the matter is that some reason had to be assigned or explanation given for the signing of the note by William H. Albright if the purchase was made by Villa C. Albright, or for her, hence the reason given, that Mrs. Albright did not like Mrs. Peterson and was not on friendly terms with her. But the check which the appellee William H. Albright testifies he gave Mrs. Peterson as part of the purchase price was signed by him and not by Mrs. Albright and no reason or explanation whatever is given by either Mr. or Mrs. Albright for the signing of the check by Mr. Albright instead of Mrs. Albright. Even if Mrs. Albright was not friendly with Mrs. Peterson and was not on good terms with her that could be no excuse for her not signing the check. The check could have been drawn in favor of her husband and he could have endorsed it and handed it to Mrs. Peterson, or he could have cashed it and paid the money over to Mrs. Peterson, but apparently nothing of this kind was done. Mr. Albright did not ask his wife to sign the check or to give him the money to pay the amount of the purchase price in excess of the \$500. represented by the note, he simply drew his own check against his own account and gave it to Mrs. Peterson.

Examining the evidence of Mr. and Mrs. Al-

bright further, we find that it shows that when they were married all the property owned by Mrs. Albright was \$50. (Tr. p. 117), and that the appellee William H. Albright had conveyed all of his property to his wife in order to protect himself against any judgments which might be obtained against him on account of injuries received by his employees while he was operating the quarry (Tr. p. 117). In effect this evidence says that all of the property belonged to William H. Albright, but in order to protect himself he carried the title in the name of his wife Villa C. Albright.

We submit that all of this evidence shows conclusively that while this property was conveyed to the appellee Villa C. Albright it was purchased with money of the appellee William H. Albright, and that the title to this particular land is held by the appellee Villa C. Albright as a trustee for the appellee William H. Albright.

We wholly agree with the general doctrine as laid down in *United States vs. Maxwell Land Grant Company*, 121 U. S. 328, *Colorado Coal and Iron Co. vs. United States*, 123 U. S. 307; *United States vs. Budd*, 144 U. S. 154, and many other decisions; that in cases of this character the testimony must be clear, unequivocal and convincing and requires more than a mere preponderance of the evidence, and we most earnestly submit that the evidence in this case, when closely examined and analyzed, not only preponderates in favor of the appellant, but it is so clear and convincing that it must lead to the

conclusion that an unlawful agreement or contract was entered into between the defendant Jennie Peterson and the appellee William H. Albright, and that the terms of such contract or agreement were fully performed and carried out, and that the appellee Villa C. Albright acquired title to said lands not only with notice of the fraud perpetrated upon the appellant but as a trustee for the appellee William H. Albright, and that, therefore, the lower court was in error in holding that the allegations contained in the bill complaint were not sustained by the proof and in dismissing the bill of complaint and entering judgment against the appellant and in favor of the appellees.

Respectfully submitted,

BURTON K. WHEELER,
United States Attorney.

FRANK WOODY,
Assistant U. S. Attorney.

IN THE
UNITED STATES CIRCUIT
COURT OF APPEALS
FOR THE
NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

JENNIE PETERSON (Formerly JENNIE
BENEDICT), WILLIAM H. ALBRIGHT,
and VILLA C. ALBRIGHT,
Appellees.

BRIEF FOR APPELLEES,
WILLIAM H. ALBRIGHT AND VILLA C.
ALBRIGHT.

COOPER & STEPHENSON,

Attorneys for Appellees

WILLIAM H. AND VILLA C. ALBRIGHT

OCT 26 1914

F. D. Monckton,
Clerk.

IN THE
UNITED STATES CIRCUIT
COURT OF APPEALS
FOR THE
NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

JENNIE PETERSON (Formerly JENNIE
BENEDICT), WILLIAM H. ALBRIGHT,
and VILLA C. ALBRIGHT,

Appellees.

No. 2414

BRIEF FOR APPELLEES,
WILLIAM H. ALBRIGHT AND VILLA C.
ALBRIGHT.

MAY IT PLEASE THE COURT:

The statement of this case by the United States District Attorney is so full and fair that we feel relieved of the necessity of making any additions thereto.

The attorney for the Appellant has admitted that there is nothing in the claim that the Peter-

son land is mineral in character, and he concedes that at the time it was filed upon by Peterson it was open to such filing.

This leaves for determination only the question whether the land was taken by Peterson for Albright under an agreement substantially as claimed by Peterson.

The District Court in its memorandum opinion, filed herein and contained on pp. 49 and 50 of the record, is so clear and succinct a statement of the short-comings of complainant's proof that we feel warranted in quoting it entirely as our argument in chief.

“MEMO.

“The Court refers to its comment in the companion case, No. 226, United States vs. Charles Gustafson, et al.

The evidence herein falls short of the high degree of proof the Government must produce to warrant cancellation of its executed contract, its patent and grant of title. It may be the truth is as complainant alleges, but the evidence in quantity and quality does not satisfy and convince the court it is so. It serves to arouse suspicion it may even preponderate in favor of complainant, but that does not suffice. It may be fraud triumphs and the guilty escapes, but that does not warrant a contrary conclusion herein. When the Government deliberately issues its

patent to lands, the instrument is high and solemn evidence of its own validity, to be overcome only by clear and convincing evidence, in quantity and quality which commands respect and produces conviction. Peterson does not commend herself to credibility.

There are no circumstances to corroborate Peterson. Tickets, letters, etc., of which she speaks, rest on her (49) testimony. Albrights deny her statements. Her insistence that her lands should have water thereon is inconsistent to some extent with an agreement with Albright. She may have had some such arrangement as Carter. Albright's books are inconsistent with her testimony that he paid all her expenses on the land. If as Whittaker says many of Albright's quarry-men were taking up lands for Albright, why should he have sent to Michigan at his expense for Peterson?

Upon the whole, the proof fails."

We would feel like submitting the case upon the opinion of the District Court were it not for the fact that Counsel for Appellant makes a somewhat extraordinary attempt to find in the evidence some corroboration of the story told by Peterson, and we feel that we perhaps owe to the court the duty of showing that this alleged corroboration of Peterson exists only in the very

vivid imagination of Counsel for Appellant.

Counsel recognizes the necessity for finding corroboration for the testimony of Peterson. Confessedly, according to her own story she started out deliberately intending to defraud the Government by obtaining the title to the land, not for the purposes for which the law authorizes it to be taken, but deliberately for speculative purposes.

We agree with the District Court that Peterson does not commend herself to credibility. We also insist that he is right in saying that there are no circumstances to corroborate Peterson.

She claims that she left Michigan, July 5, 1901 to come out to Montana for the purpose of filing upon the land and that Albright had written her and sent her a ticket with which to come. Neither the letter nor the ticket are found to corroborate her. She thinks the letter may have been destroyed, but she does not know. If any such ticket had been obtained for her use, it could, of course, have been found among the records of the Railroad Company which issued it. Nothing of the kind appears to have been attempted. Her mother still living in Michigan would probably have known of the letter and ticket had they ever existed.

It is claimed by the District Attorney that Gustafson corroborates Peterson. Gustafson's testimony is found upon p. 95 of the Transcript.

He claims that he had a conversation with Albright and that Albright told him that Jennie Peterson was going out there to take up land for Albright, and that this talk was in April or May and that Peterson's filing was in July.

Confessedly this alleged talk with Gustafson was long before Albright had ascertained that Peterson would come out from Michigan. So that the corroboration, so far as Gustafson is concerned, is a myth.

The only other corroborating witness is Frank C. Whittaker, the uncle of Peterson.

We submit that a careful reading of the testimony of Whittaker, found on pp. 75 to 93 of the record will disclose that it is wholly unworthy of credence. He is confessedly unfriendly to the Albrights and his testimony consists of a long rambling series of generalities, wholly devoid of time, place or circumstance, and that the character which he gives himself does not recommend him as a person entitled to much, if any, credit.

Peterson claims that all of the expenses incurred by her upon her Homestead were paid by Albright. This is distinctly contradicted by Albright's books which Peterson kept for a number of years. Peterson claims she was to receive \$640 for her land the "same as the others." She actually received \$800. Transcript p. 102.

The testimony of Albright, commencing with p. 96 and continuing to p. 112 of Transcript,

shows that whenever Peterson, or Gustafson, or any of the other homesteaders were absent from work on their respective Homesteads, they lost their time and that they were only paid for the time they actually put in at the quarries.

This all goes to show that the books which Peterson kept distinctly contradict her, and what is true of Peterson is true of Whittaker and Gustafson.

The District Attorney in his brief criticises the testimony of Mrs. Albright as unreasonable and the chief ground for his allegation that it is unreasonable seems to be the fact that Mrs. Albright testified that she was not friendly with Peterson and had very little conversation with her. Assuming that Peterson and Mrs. Albright were working together and that it was therefore unreasonable that they should not talk more or less of their affairs, leaving the inference that the District Attorney's idea is that Peterson was at work for Mrs. Albright in a domestic capacity. This is not the situation.

It is true Mrs. Albright owned most of the lands upon which the Albright quarries were situated, but the record also discloses that Mrs. Albright had leased the quarries to the Boston & Montana Consolidated Copper and Silver Mining Company upon a royalty basis, the Mining Company paying Mrs. Albright a royalty for all of the limestone taken from her lands, and that

the Mining Company in turn leased the lands to Albright and Albright extracted the rock from the quarries for so much per ton and shipped it to the Mining Company. It will thus be seen that Albright conducted the mining of rock and the business incident thereto, and that Peterson worked for him in the capacity of a book-keeper and not for Mrs. Albright.

See Tr. p 95, Testimony of Gustafson and the testimony of Albright following.

Mrs. Albright attending to her domestic concerns need not of necessity have been drawn into any companionship with Peterson. So that the criticism leveled at her testimony by the District Attorney is without force.

Going back to the testimony of Albright (Tr. p. 101) he shows by reference to his books that he paid none of the expenses incident to the improvements upon the Peterson place. He shows that one Hermann built the cabin and did other work for Peterson and that while Hermann was absent doing such work he did not receive any credit at the quarries, but lost his time while at work for Peterson. Further, the interview testified to by Albright with Peterson wherein he alleges she demanded a thousand dollars from him and threatened that if the money was not forthcoming she and Whittaker and Gustafson would send Albright to the penitentiary, by preponderance of the evidence does not seem to be denied

by Peterson. And the testimony of Whittaker is not only shown to be without reliability because of its very general character, but he is as positive that the Peterson claim is underlaid with gypsum as he is about any of his testimony. And the fact is made so clear by the testimony of Prof. Mortson that there is no gypsum in the Peterson claim that Whittaker's testimony is shown to be wholly unreliable.

Counsel for complainant insists that either the court must find the contract which Peterson says was made, was in fact made and carried out, or the court must find that the witnesses conspiring together concocted an elaborate scheme of falsification and carried it out with deliberate, preconcerted and harmonious perjury.

Not quite so serious as that—Perjury, yes—but far from harmonious and not very elaborate.

The statements of all of these witnesses are so general and indefinite and so devoid of time, place or circumstance that the statements of one have little, if any, relation or tangible connection or probative force as corroborative of those of the others. And it is not difficult to understand that persons who confess to have committed perjury may readily do so again.

Accordingly, we feel that the District Court was right in saying "There are no circumstances to corroborate Peterson. Ticket, letters, etc., of which she speaks, rest on her testimony. Albright

denies her statements. Her insistence that her lands should have water thereon is inconsistent to some extent with an agreement with Albright. She may have had some such arrangement as Carter. Albright's books are inconsistent with her testimony that he paid all her expenses on the land. If as Whittaker says many of Albright's quarrymen were taking up lands for Albright, why should he have sent to Michigan at his expense for Peterson?"

In view of the fact that complainant issued its patent to Peterson and of the solemn character of this instrument and of the clear character of proof required to set aside or cancel a patent, we submit the court was right in declining to cancel the patent in this case in view of the character of the evidence contained in the record, and insist that the judgment of the court below, being right, should be affirmed.

Respectfully submitted,

Attorneys for Appellees,
William H. and Villa C. Albright.

No. 2416

IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS
FOR THE NINTH CIRCUIT

ANDREW WEST, APPELLANT,

VS.

EDWARD RUTLEDGE TIMBER COMPANY, A CORPO-
RATION, AND NORTHERN PACIFIC RAILWAY
COMPANY, A CORPORATION, RESPONDENTS.

TRANSCRIPT OF THE RECORD

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF IDAHO, NORTHERN DIVISION.

FILED

MAY 4 - 1914

No. _____

IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS
FOR THE NINTH CIRCUIT

ANDREW WEST, APPELLANT,

VS.

EDWARD RUTLEDGE TIMBER COMPANY, A CORPO-
RATION, AND NORTHERN PACIFIC RAILWAY
COMPANY, A CORPORATION, RESPONDENTS.

TRANSCRIPT OF THE RECORD

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF IDAHO, NORTHERN DIVISION.

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*In the District Court of the State of Idaho, in and for the
First Judicial District.*

ANDREW WEST,

Plaintiff,

vs.

THE EDWARD RUTLEDGE TIMBER COMPANY, a
Corporation, and the NORTHERN PACIFIC RAILWAY
COMPANY, a Corporation,

Defendants.

Complaint.

Plaintiff complains of the defendants and alleges:

I.

That the defendant Edward Rutledge Timber Company, is a corporation organized and existing under the laws of the State of Washington, with its principal place of business in the City of Spokane, Washington.

II.

That at all times herein mentioned the Northern Pacific Railway Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

III.

That at all times herein mentioned the plaintiff was and now is a citizen of the United States, over the age of twenty-one years, and qualified to enter and acquire title to one hundred and sixty acres of land under the laws of the United States.

IV.

That on or about the 15th day of May, 1903, the plaintiff located and settled upon the Southeast Quarter of Section 20, Township 44 North, Range 3, E. B. M., then unsurveyed, situated in the County of Shoshone, State of Idaho, within the Coeur d'Alene Land District, and has ever since continuously resided upon said land, cultivated and improved the same, and is now residing thereon.

V.

That at the time of the location and settlement by plaintiff upon the land above described, the same was vacant, unoccupied and unsurveyed land belonging to the United States, and no claim of right or title to, or interest in, the said lands and premises or any part thereof had then been made by any person, persons, or corporation whomsoever, nor was there any evidence whatsoever upon the said land or premises or any part or parcel thereof, nor in the United States Land Office for the district in which said land was situated, to-wit, in the Coeur d'Alene Land District, nor in the General Land Office in Washington, D. C., showing any claim, right, title or interest by any person, persons or corporation whomsoever, to the said lands and premises or any part or parcel thereof, nor were there any marks, blazes, notices or other evidence whatsoever of the location, selection, claim or possession marked or traced upon the ground, or upon or near the same or any part thereof, nor had the boundaries thereof been traced or located by reference to any natural objects or permanent monuments, or marked or located by any monument of any kind or character whatsoever; that no person had prior to the location and settlement, of this plaintiff upon said land, nor since said settlement, and to date hereof, ever entered upon the same or attempted to locate or reside thereon, or on any part or parcel thereof.

VI.

That on the 17th day of July, 1905, the official plat of the survey of the land and premises hereinbefore described was filed in the local land office in Coeur d'Alene City, Idaho, and on said date the said lands first became open for entry under the homestead laws of the United States, and on said date plaintiff duly made application to enter said lands in the manner and form required by law under the homestead laws of the United States, which said application was rejected by the local land office, and thereafter and on the 10th day of May, 1910, said order rejecting the application of the plaintiff to file as aforesaid was approved by the Secretary of the Interior, and the case finally closed.

VII.

That on the 21st day of June, 1901, the Northern Pacific Railway Company filed in the General Land Office its selection list No. 61, which said list contained the following pretended description, to-wit: "The Southeast Quarter of Section 20, Township 44 North, Range 3, E. B. M." That at the time of filing said selection list No. 61, said pretended description was wholly imaginary, and no lands in the State of Idaho or elsewhere were or could be so designated or described; for the reason that at the time of filing same as aforesaid no such survey had been made or attempted. That neither the said Northern Pacific Railway Company or any of its servants, agents, attorneys or employees knew or pretended to know what lands were referred to in said pretended description, nor did said defendant then know that in the event of a survey thereafter that said pretended description would be applied to the lands and premises now occupied by the plaintiff as aforesaid, and which said pretended description was the sole and only description contained in said list and selection, and which said pretended description was then and there wholly insufficient to locate

or describe the lands and premises thereafter located and settled upon the plaintiff as hereinbefore alleged, or any part or parcel thereof, or any lands in the State of Idaho, or elsewhere, rendering said list and selection by defendant Northern Pacific Railway Company, wholly void and of no force or effect whatsoever.

VIII.

That thereafter on the 10th day of October, 1910, a patent to said land was issued to the Northern Pacific Railway Company, a corporation.

IX.

That plaintiff is informed and believes and therefore alleges the facts to be, that subsequent to the 21st day of June, 1901, and prior to the commencement of this action the Northern Pacific Railway Company, a corporation, transferred and caused to be transferred to the defendant Edward Rutledge Timber Company, a corporation, all of its right, title and interest in and to the land and premises hereinbefore described, and the said Edward Rutledge Timber Company, a corporation, now claims to be the owner of the legal title to the lands and premises above described.

X.

That neither the said Northern Pacific Railway Company, a corporation, or the said Edward Rutledge Timber Company, a corporation, or any agent, servant, attorney, or employee whomsoever of either of said defendants have ever been in possession of the said land and premises or any part or parcel thereof, but the possession thereof since the 15th day of May, 1903, has been and is now in this plaintiff to the exclusion of all other person, persons or corporation whomsoever; that neither of said defendants have ever complied with the laws of the United States so as to entitle them or either of them to claim any interest in or right or

title to the said lands and premises or any part or parcel thereof as against this plaintiff.

XI.

That the action and decision of the local land office rejecting the application of the plaintiff to enter upon the land and premises hereinbefore described under the homestead laws of the United States on the 17th day of July, 1905, was and is contrary to law, and in violation of the rights of this plaintiff, and the approval of said decision rejecting said application of the plaintiff by the Commissioner of the General Land Office, and the approval thereof by the Secretary of the Interior, were and are wrongful and unlawful and based upon an erroneous construction of the law, and upon a statement of facts upon and concerning which there was and is no conflict.

XII.

That long prior to the said 10th day of October, 1910, and on said date, and at the time of the issuance of the patent to the Northern Pacific Railway Company, a corporation, to the land and premises herein described, this plaintiff was and at all times since has been and now is, the owner and lawfully entitled to the patent for and the legal title to said premises and each and every part thereof.

XIII.

That each and every, all and singular of the acts of the defendants herein and each of them of and concerning their attempted selection and claim in and to said land and premises, and all the acts and proceedings of the Commissioner of the General Land Office and the Secretary of the Interior in connection therewith, and in the issuance of said patent are and were contrary to and without authority at law, and in violation of the rights of this plaintiff, and that at the time of the pretended initiation of said claim on the

part of the Northern Pacific Railway Company in and to said lands and premises, the said Northern Pacific Railway Company was wholly without any right or authority at law to select or claim the said land or any part thereof, and that the Act of Congress of the United States dated March 2nd, 1899, under and by virtue of which the said defendant Northern Pacific Railway Company based the right to select and claim said lands, is unconstitutional and void, and confers no right whatsoever upon said defendant to select or claim said land or any part thereof as against this plaintiff.

WHEREFORE, plaintiff prays that if he be adjudged and decreed to be the owner of the lands and premises herein described, and entitled to the possession thereof, and in the possession thereof, and that the defendants and each of them be decreed to hold such title as they may possess under the patent of the United States in and to said premises in trust for this plaintiff, and for the sole use and behoof of this plaintiff, and that they be decreed to convey the same to this plaintiff by proper deed of conveyance and that the title thereto be forever quieted in this plaintiff, and for his costs and disbursements in this action expended, and for such other and further relief in the premises as to the Court may seem equitable and just.

JOHN H. WOURMS,

Residence and P. O. Address, Wallace, Idaho.

H. W. RICH,

A. H. KENYON,

P. O. Address, Spokane, Wash.

Attorneys for Plaintiff.

State of Washington,
County of Spokane,—ss.

Andrew West, being first duly sworn says: That he is the plaintiff named in the above entitled action; that he has

read the foregoing complaint, knows the contents thereof, and that the same is true, of his own knowledge except as to those matters stated on information and belief and as to those matters he believes it to be true.

ANDREW WEST.

Subscribed and sworn to before me this 13th day of April, 1912.

(Notarial Seal)

CHAS. A. JONES,

Notary Public, Residing at Spokane, Washington.

(Endorsed): No. 3173. In District Court of the State of Idaho, in and for the First Judicial District. Andrew West, Plaintiff, vs. The Edward Rutledge Timber Co., and Northern Pacific Railway Company, Defendants. Complaint. Filed June 5, 1912, at 9:45 o'clock a. m. John P. Sheehy, Clerk of District Court, by L. R. Adams, Deputy Clerk. John H. Wourms, H. W. Rich and A. H. Kenyon, Attys. for Pltf.

(Endorsed): Filed July 13, 1912, at 4 o'clock p. m., A. L. Richardson, Clerk U. S. Courts. By Lawrence M. Larson, Deputy.

Answer of Edward Rutledge Timber Co.

In the District Court of the United States for the District of Idaho, Northern Division.

In Equity.

ANDREW WEST,

Complainant,

vs.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and the NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Answer of Defendant Edward Rutledge Timber Co.

Now comes the defendant Edward Rutledge Timber Com-

pany, and for its answer to the bill of complaint of the complainant, Andrew West, says:

1. Defendant admits that it is and was at all the times mentioned in the bill of complaint a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business in the City of Spokane, in said State; and alleges that previous to the times mentioned in the bill this defendant had in all things duly complied with all the conditions and requirements of the constitution and laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that this defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

2. Defendant admits that the defendant Northern Pacific Railway Company is and was at all the times mentioned in the bill a corporation organized and existing under the laws of the State of Wisconsin; and on information and belief alleges that previous to the times mentioned in the bill defendant Northern Pacific Railway Company had in all things duly complied with all the conditions and requirements of the constitution and laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that said defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

3. Defendant has no knowledge or information sufficient to form a belief as to whether the complainant is a citizen of the United States, but admits and avers that

complainant is a resident and inhabitant of the State of Idaho.

4. Defendant has no knowledge or information sufficient to form a belief as to whether the complainant is or was, at any of the times mentioned in his said bill, qualified or entitled to enter or acquire title to public land of the United States under the homestead or other laws of the United States.

5. Defendant admits that at some time prior to the year 1906 complainant went upon the land described in his said bill, viz: the Southeast quarter ($SE\frac{1}{4}$) of Section twenty (20), in Township forty-four (44) North, Range three (3) West of Boise Meridian, in the County of Shoshone and State of Idaho, and constructed a dwelling thereon, and that complainant has occupied said dwelling at intervals since that time; but this defendant has no knowledge or information sufficient to form a belief as to the date when complainant so went upon said land and so constructed said dwelling thereon, or as to whether complainant ever located and settled on said land or any part thereof or established a residence thereon, or has ever resided upon or improved the same except as aforesaid, or is now residing thereon; and denied that since complainant went upon said land as aforesaid he has continuously resided thereon, or that he has continuously or otherwise cultivated the same.

6. Defendant denies that complainant ever attempted, in good faith, to establish a residence on said land or to make his home thereon, or endeavored in good faith or otherwise, to comply with the homestead laws of the United States, or to acquire the said land or any part thereof as his home; and alleges that, on the contrary, the said land is and always has been principally, if not wholly, valuable for the timber thereon; that the same is rough and unfertile and of substantially no value for agricultural purposes; and that complainant went upon the same and

endeavored to acquire title thereto, not with the intent of making a home thereon, but with intent to acquire the valuable timber thereon for speculative purposes.

7. Defendant denies that at the time of complainant's alleged settlement on the said land, or at any time since the 21st day of June, 1901, the same was vacant, unoccupied or unappropriated public land of the United States, or free from claim of right or title; and denies that at the time of such alleged settlement, or at any time after the 21st day of June, 1901, there was no evidence upon the said land, or in the United States Land Office of the district in which said land was and is situated, to-wit: in the United States District Land Office at Coeur d'Alene, Idaho, or in the General Land Office at Washington, D. C., showing that said land was claimed by the defendant Railway Company or this defendant, or that the boundaries of said land had not then been traced, marked or located by monuments; and alleges that, on the contrary, the said land was at all times subsequent to the 21st day of June, 1901, segregated from the public domain and appropriated by the selection thereof made by the defendant Northern Pacific Railway Company as hereinafter set forth, and was therefore not open or subject to any other appropriation, entry or claim; that the fact of such selection, appropriation and segregation appeared upon the face of the records of the said United States Land Office at Coeur d'Alene, Idaho, and the records of the General Land Office at Washington, D. C.; that the boundaries of the said land and the lines of survey thereof were duly and plainly traced and marked out upon the land and located by monuments long prior to the time when complainant went upon said land and made his alleged settlement thereon; that at the time complainant first went upon said land and at all times thereafter complainant had full knowledge and notice of the selection of said land by the defendant Railway Company as hereinafter set

forth, and of the segregation and appropriation of said land by virtue of such selection; and that complainant went upon said land and made his alleged settlement thereon and thereafter occupied the same and made application to enter the same under the homestead laws, and endeavored to acquire title thereto, not in good faith, but well knowing of the defendant Railway Company's prior selection thereof and of this defendant's right thereunder, and in the hope that the claim of these defendants to the land might be defeated on technical grounds and that complainant might acquire said land and the valuable timber thereon for purposes of speculation.

8. Defendant alleges that on the 21st day of June, 1901, the land described in the bill of complaint was unsurveyed public land of the United States, non-mineral in character, not reserved, and to which no adverse right or claim had attached or been initiated; that the same was situated within the County of Shoshone and the State of Idaho, through which the railroad of the Northern Pacific Railroad Company was constructed and through which the same had been operated by said Railroad Company and by the defendant Railway Company, as its successor, and was then being operated by the defendant Railway Company; that said land was so classified as non-mineral at the time of actual government survey; that on said 21st day of June, 1901, the defendant Railway Company duly made selection of the said land under the provisions of the Act of Congress entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the "Mount Ranier National Park," approved March 2, 1899 (30 Stat. L. 993), in lieu of an equal quantity of land relinquished to the United States pursuant to the provisions of said Act of Congress; that said selection was duly made by filing in the said United States Land Office at Coeur

d'Alene, Idaho, a proper selection list or application to select, which was in all respects in accordance with the conditions and requirements of the said Act of Congress and the rules, regulations and practice established and approved by the Secretary of the Interior and the Commissioner of the General Land Office; that said selection list properly and accurately described said land so selected, in such manner as to designate the same with a reasonable degree of certainty, as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selections; that said selection list was in all respects regular and proper in form and substance, and that the same was duly accepted, approved and allowed by the Register and Receiver of the said United States Land Office.

9. Defendant further alleges that on or about the 17th day of July, 1905, the official township plat of survey of the township in which the said land is situated was filed in the said United States Land Office at Coeur d'Alene, Idaho; and that shortly after said last mentioned date and within the time specified in said Act of Congress, the defendant Railway Company caused to be made and filed in said United States Land Office at Coeur d'Alene, Idaho, in accordance with the provisions of Section 4 of said Act, a new selection list embracing the selections embraced in the said selection list of June 21, 1901, including the selection of the land described in the bill, describing the land so selected according to such survey; which said supplemental list was so made and filed in exact compliance and in accordance, in matters of form as well as substance, with the provisions of the said Act of Congress and the rules, regulations and practice of the Secretary of the Interior and the Commissioner of the General Land Office applicable to such selections.

10. Defendant alleges that prior to the time when com-

plainant first went upon said land and the time when he made his alleged settlement thereon, the said land had been surveyed in the field by the official surveyors of the United States, under the direction of the Surveyor General and the Commissioner of the General Land Office; that the lines of survey and the boundaries of said tract of land were properly and plainly marked out upon the land by monuments, blazes and other marks; that the said survey so made was thereafter approved by the Surveyor General of the United States and the Commissioner of the General Land Office, according to law; that the lines of survey so traced and marked are identical with the lines of survey shown on the township plat of survey filed as aforesaid; and that the said lines of survey, and the boundaries of the said tract of land as established and defined thereby, were well known to complainant at the time complainant went upon said land and made his alleged settlement thereon and at all times thereafter.

11. Defendant denies that at the time the defendant Railway Company's said selection list was so filed the description of the said land contained in said selection list was imaginary, and denies that the description contained in said selection list was insufficient to designate, locate or describe the lands so selected, and alleges that in and by said selection list the said land was properly and sufficiently described, in such manner as to designate the same with a reasonable degree of certainty, in the manner prescribed and required by the said Act of Congress and by the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to selections under said act.

12. Defendant admits that shortly after the township plat of survey was filed in the said United States Land Office at Coeur d'Alene, Idaho, as hereinbefore set forth, complainant tendered to the Register and Receiver of said Land

office an application to enter the said land under the homestead laws of the United States; that such application was rejected by said Register and Receiver; and that thereafter the action of said Register and Receiver in so rejecting said application was confirmed by the Commissioner of the General Land Office and by the Secretary of the Interior; but defendant has no knowledge or information sufficient to form a belief as to whether or not such application to enter said land was made by complainant in the form and manner required by law, or in compliance with the rules, regulations and practice of the General Land Office or of the Department of the Interior governing such applications; and alleges that the action of the said Register and Receiver in so rejecting such application, and of the Commissioner of the General Land Office and the Secretary of the Interior in so confirming such rejection, was right and proper and in accordance with law, and not in violation of any right of complainant; and defendant further denies that the decisions of said officers were based upon an erroneous construction of the law and upon a state of facts concerning which there was and is no conflict or dispute, and alleges, on the contrary, that the decisions of said officers were based upon questions of mixed law and fact.

13. Defendant alleges that the said selection so made by the defendant Railway Company of the land described in said bill of complaint, and the said selection lists so filed by it were thereafter duly approved and allowed by the Commissioner of the General Land Office and by the Secretary of the Interior, pursuant to and as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selections; and that thereafter, and at or about the time stated in said bill of complaint, a patent of the United States conveying the said land to the de-

fendant Railway Company was duly issued, granted and delivered to the defendant Railway Company in accordance with law.

14. Defendant admits and alleges that after the 21st day of June, 1901, and prior to the time when complainant first went upon said land, this defendant entered into an agreement with the defendant Railway Company, whereby the defendant Railway Company, for a valuable consideration paid to it by this defendant, sold the said land to this defendant, and undertook and agreed to convey the same to it by warranty deed; and that thereafter the defendant railway company did duly convey the said land to this defendant, by warranty deed dated the 11th day of February, 1911.

WHEREFORE, Defendant prays that it be hence dismissed, with costs.

EDWARD RUTLEDGE TIMBER COMPANY,

By Charles A. Weyerhaeuser, Secretary.

Charles W. Bunn,

Edward J. Cannon,

Charles Donnelly,

Grafton Mason,

Stiles W. Burr,

R. L. Black,

Solicitors and of Counsel for Defendant.

State of Minnesota,

County of Morrison.—ss.

Charles A. Weyerhaeuser, came before me personally and being duly sworn on oath deposes and says that he is the Secretary of the above named defendant Edward Rutledge Timber Company and authorized to make this affidavit in its behalf, that he has read the foregoing answer, and that the same is true of his own knowledge, except as

to those matters therein stated on information and belief,
and that as to such matters he believes it to be true.

(Corporate Seal)

CHARLES A. WEYERHAEUSER.

Subscribed and sworn to before me this 29th day of
August, 1912.

(Notarial Seal)

HERMAN UTSCH,

Notary Public, Morrison County, Minnesota.

My Commission Expires April 30, 1913.

(Endorsed): Filed September 26, 1912, A. L. Richardson, Clerk.

Answer of Northern Pacific Railway Co.

*In the District Court of the United States for the District
of Idaho, Northern Division.*

In Equity.

ANDREW WEST,

Complainant,

vs.

THE EDWARD RUTLEDGE TIMBER COMPANY, a
Corporation, and the NORTHERN PACIFIC RAILWAY
COMPANY, a corporation.

Defendants.

Answer of Defendant Northern Pacific Railway Company.

Now comes the defendant, Northern Pacific Railway Company, and for its answer to the bill of complaint of the complainant, Andrew West, says:

1. Defendant admits that it is and was at all the times mentioned in the bill of complaint a corporation organized and existing under the laws of the State of Washington, with its principal office and place of business in the City of Spokane, in said State; and alleges that previous to the times mentioned in the bill this defendant had in all things

duly complied with all the conditions and requirements of the constitution and laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that this defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

2. Defendant admits that the defendant Edward Rutledge Timber Company is and was at all the times mentioned in the bill a corporation organized and existing under the laws of the State of Washington; with its principal place of business in the City of Spokane, in said State, and on information and belief alleges that previous to the times mentioned in the bill said defendant Edward Rutledge Timber Company had in all things duly complied with all the conditions and requirements of the constitution and laws of the State of Idaho applicable to corporations not incorporated under the laws of said State, and has at all times since duly complied with the same, and that said defendant is now and was at all the times mentioned in the bill duly authorized to transact business in the State of Idaho, and to acquire, own, hold and dispose of real property in said State.

3. Defendant has no knowledge or information sufficient to form a belief as to whether the complainant is a citizen of the United States, but admits and avers that complainant is a resident and inhabitant of the State of Idaho.

4. Defendant has no knowledge or information sufficient to form a belief as to whether the complainant is or was, at any of the times mentioned in his said bill, qualified or entitled to enter or acquire title to public land of the United States under the homestead or other laws of the United States.

5. Defendant admits that at some time prior to the year 1906 complainant went upon the land described in this said bill, viz: the Southeast quarter (SE $\frac{1}{4}$) of Section twenty (20), in Township forty-four (44) North, Range three (3) West of Boise Meridian, in the County of Shoshone and State of Idaho and constructed a dwelling thereon, and that complainant has occupied said dwelling at intervals since that time; but this defendant has no knowledge or information sufficient to form a belief as to the date when complainant so went upon said land and so constructed said dwelling thereon, or as to whether complainant ever located and settled on said land or any part thereof or established a residence thereon, or has ever resided upon or improved the same except as aforesaid, or is now residing thereon; and denies that since complainant went upon said land as aforesaid he has continuously resided thereon, or that he has continuously or otherwise cultivated the same.

6. Defendant denies that complainant ever attempted, in good faith, to establish a residence on said land or to make his home thereon, or endeavored in good faith or otherwise, to comply with the homestead laws of the United States, or to acquire the said land or any part thereof as his home; and alleges that, on the contrary, the said land is and always has been principally, if not wholly, valuable for the timber thereon; that the same is rough and unfertile and of substantially no value for agricultural purposes; and that complainant went upon the same and endeavored to acquire title thereto, not with the intent of making a home thereon, but with intent to acquire the valuable timber thereon for speculative purposes.

7. Defendant denies that at the time of complaint's alleged settlement on the said land, or at any time since the 21st day of June, 1901, the same was vacant, unoccupied or unappropriated public land of the United States, or free

from claim of right or title; and denies that at the time of such alleged settlement, or at any time after the 21st day of June, 1901, there was no evidence upon the said land, or in the United States Land Office of the District in which said land was and is situated, to-wit: In the United States District Land Office at Coeur d'Alene, Idaho, or in the General Land Office at Washington, D. C., showing that said land was claimed by this defendant, or that the boundaries of said land had not then been traced, marked or located by monuments; and alleges that on the contrary, the said land was at all times subsequent to the 21st day of June, 1901, segregated from the public domain and appropriated by the selection thereof made by this defendant as hereinafter set forth, and was therefore not open or subject to any other appropriation, entry or claim; that the fact of such selection, appropriation and segregation appeared upon the face of the records of the said United States Land Office at Coeur d'Alene, Idaho, and the records of the General Land Office at Washington, D. C., that the boundaries of the said land and the lines of survey thereof were duly and plainly traced and marked out upon the land and located by monuments long prior to the time when complainant went upon said land and made his alleged settlement thereon; that at the time complainant first went upon said land and at all times thereafter complainant had full knowledge and notice of the selection of said land by this defendant as hereinafter set forth, and of the segregation and appropriation of said land by virtue of such selection; and that complainant went upon said land and made his alleged settlement thereon, and thereafter occupied the same and made application to enter the same under the homestead laws, and endeavored to acquire title thereto, not in good faith, but well knowing of this defendant's prior selection thereof and in the hope that this defendant's claim to the land might be defeated on technical

grounds and that complainant might acquire said land and the valuable timber thereon for purposes of speculation.

8. Defendant alleges that on the 21st day of June, 1901, the land described in the bill of complaint was unsurveyed public land of the United States, non-mineral in character, not reserved, and to which no adverse right or claim had attached or been initiated; that the same was situated within the County of Shoshone and the State of Idaho, through which the railroad of the Northern Pacific Railroad Company was constructed and through which the same had been operated by said Railroad Company and by this defendant, as its successor, and was then being operated by this defendant; that said land was so classified as non-mineral at the time of actual Government survey; that on said 21st day of June, 1901, this defendant duly made selection of the said land under the provisions of the Act of Congress entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainer National Park," approved March 2, 1899 (30 Stat. L. 993), in lieu of an equal quantity of land relinquished to the United States pursuant to the provisions of said Act of Congress; that said selection was duly made by filing in the said United States Land Office at Coeur d'Alene, Idaho, a proper selection list or application to select, which was in all respects in accordance with the conditions and requirements of the said Act of Congress and the rules, regulations and practice established and approved by the Secretary of the Interior and the Commissioner of the General Land Office; that said selection list properly and accurately described said land so selected, in such manner as to designate the same with a reasonable degree of certainty, as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selec-

tions; that said selection list was in all respects regular and proper in form and substance, and that the same was duly accepted, approved and allowed by the Register and Receiver of the said United States Land Office.

9. Defendant further alleges that on or about the 17th day of July, 1905, the official township plat of survey of the township in which the said land is situated was filed in the said United States Land Office at Coeur d'Alene, Idaho; and that shortly after said last mentioned date and within the time specified in said Act of Congress, this defendant caused to be made and filed in said United States Land Office at Coeur d'Alene, Idaho, in accordance with the provisions of Section 4 of said Act, a new selection list embracing the selections embraced in the said selection list of June 21, 1901, including the selection of the land described in the bill, describing the land so selected according to such survey; which said supplemental list was so made and filed in exact compliance and in accordance, in matters of form as well as substance, with the provisions of the said Act of Congress and the rules, regulations and practice of the Secretary of the Interior and the Commissioner of the General Land Office applicable to such selections.

10. Defendant alleges that prior to the time when complainant first went upon said land and the time when he made his alleged settlement thereon, the said land had been surveyed in the field by the official surveyors of the United States, under the direction of the Surveyor General and the Commissioner of the General Land Office; that the lines of survey and the boundaries of said tract of land were properly and plainly marked out upon the land by monuments, blazes and other marks; that the said survey so made was thereafter approved by the Surveyor General of the United States and the Commissioner of the General Land Office, according to law; that the lines of survey so traced and marked are identical with the lines of survey

shown on the township plat of survey filed as aforesaid; and that the said lines of survey, and the boundaries of the said tract of land as established and defined thereby, were well known to complainant at the time complainant went upon said land and made his alleged settlement thereon and at all times thereafter.

11. Defendant denies that at the time its said selection list was so filed the description of the said land contained in said selection list was imaginary, and denies that the description contained in said selection list was insufficient to designate, locate or describe the lands so selected, and alleges that in and by said selection list the said land was properly and sufficiently described, in such manner as to designate the same with a reasonable degree of certainty, in the manner prescribed and required by the said Act of Congress and by the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to selections under said act.

12. Defendant admits that shortly after the township plat of survey was filed in the said United States Land Office at Coeur d'Alene, Idaho, as hereinbefore set forth, complainant tendered to the Register and Receiver of said Land Office an application to enter the said land under the homestead laws of the United States; that such application was rejected by said Register and Receiver; and that thereafter the action of said Register and Receiver in so rejecting said application was confirmed by the Commissioner of the General Land Office and by the Secretary of the Interior; but defendant has no knowledge or information sufficient to form a belief as to whether or not such application to enter said land was made by complainant in the form and manner required by law, or in compliance with the rules, regulations and practice of the General Land Office or of the Department of the Interior governing such applications; and alleges that the action of the said Register and Receiver

in so rejecting such application, and of the Commissioner of the General Land Office and the Secretary of the Interior in so confirming such rejection, was right and proper and in accordance with law, and not in violation of any right of complainant; and defendant further denies that the decisions of said officers were based upon an erroneous construction of the law and upon a state of facts concerning which there was and is no conflict or dispute, and alleges, on the contrary, that the decisions of said officers were based upon questions of mixed law and fact.

13. Defendant alleges that the said selection so made by the defendant Railway Company of the land described in said bill of complaint, and the said selection lists so filed by it were thereafter duly approved and allowed by the Commissioner of the General Land Office and by the Secretary of the Interior, pursuant to and as required by the said Act of Congress and the rules, regulations and practice of the Department of the Interior and the General Land Office applicable to such selections; and that thereafter, and at or about the time stated in said bill of complaint, a patent of the United States conveying the said land to this defendant was duly issued, granted and delivered to this defendant in accordance with law.

14. Defendant admits and alleges that after the 21st day of June, 1901, and prior to the time when complainant first went upon said land, this defendant entered into an agreement with the defendant Edward Rutledge Timber Company, whereby this defendant, for a valuable consideration paid to it by said defendant Timber Company, sold the said land to said last named defendant, and undertook and agreed to convey the same to it by warranty deed; and that thereafter this defendant did duly convey the said land to said defendant Timber Company, by warranty deed dated the 11th day of February, 1911.

WHEREFORE, Defendant prays that it be hence dismissed, with costs.

NORTHERN PACIFIC RAILWAY COMPANY,

By R. H. Relf, Asst. Secy.

(Corporate Seal.)

Edward J. Cannon,

C. W. Bunn,

Charles Donnelly,

Grafton Mason,

Stiles W. Burr,

R. L. Black,

Solicitors and of Counsel for Defendant.

State of Minnesota,

County of Ramsey.—ss.

R. H. Relf came before me personally and being duly sworn on oath deposes and says that he is the Assistant Secretary of the above named defendant Northern Pacific Railway Company and authorized to make this affidavit in its behalf, that he has read the foregoing answer, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and that as to such matters he believes it to be true.

R. H. RELF.

Subscribed and sworn to before me this 29th day of August, 1912.

(Notarial Seal)

W. F. VAN DEYN,

Notary Public, Ramsey County, Minnesota.

My Commission Expires May 11, 1913.

(Endorsed): Filed Sept. 26, 1912, A. L. Richardson,
Clerk.

Replication to Answer of Edward Rutledge Timber Company.
*In the District Court of the United States, for the District
of Idaho, Northern Division.*

In Equity.

ANDREW WEST,

Complainant,

vs.

THE EDWARD RUTLEDGE TIMBER COMPANY, a
Corporation, and the NORTHERN PACIFIC RAILWAY
COMPANY, a Corporation,

Defendants.

*Replication to Answer of Defendant, Edward Rutledge
Timber Company.*

Comes now Andrew West complainant in the above entitled cause, and replying to the answer filed herein says that, saving and reserving all manner of exceptions to the insufficiency of the answer, for replication thereto doth say.

That his bill is true and sufficient as averred, and that he is ready to prove it, and that the answer of the defendants is untrue and insufficient.

WHEREFORE, He prays relief as set forth in his original bill.

A. H. KENYON,
H. W. RICH,
JOHN WOURMS,

Solicitors for Complainant.

P. O. Address: 828 Old National Bank Bldg., Spokane,
Spokane County, Washington.

(Endorsed): Filed October 15, 1912, A. L. Richardson,
Clerk.

By Lawrence M. Larson, Deputy Clerk.

Replication to Answer of Northern Pacific Railway Company.

*In the District Court of the United States, for the District
of Idaho, Northern Division.*

In Equity.

ANDREW WEST,

Complainant,

vs.

THE EDWARD RUTLEDGE TIMBER COMPANY, a
Corporation, and the NORTHERN PACIFIC RAILWAY
COMPANY, a Corporation,

Defendants.

*Replication to Answer of Defendant Northern Pacific Rail-
way Company.*

Comes now Andrew West complainant in the above en-
titled cause, and replying to the answer filed herein says
that, saving and reserving all manner of exceptions to the
insufficiency of the answer, for replication thereto doth
say.

That his bill is true and sufficient as averred, and that he
is ready to prove it, and that the answer of the defendants
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WHEREFORE, He prays relief as set forth in his orig-
inal bill.

A. H. KENYON,
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P. O. Address: 828 Old National Bank Bldg., Spokane,
Spokane County, Washington.

(Endorsed): Filed October 15, 1912, A. L. Richardson,
Clerk. By Lawrence M. Larson, Deputy Clerk.

*In the District Court of the United States for the District
of Idaho, Northern Division.*

ANDREW WEST,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corpo-
ration, and EDWARD RUTLEDGE TIMBER COM-
PANY,

Defendants.

Stipulation.

The final decree having been entered herein dismissing the Bill of Complaint, and the complainant being about to sue out an appeal to the Circuit Court of Appeals for the Ninth Circuit, from said final decree.

IT IS NOW STIPULATED and AGREED by and between the parties hereto by their respective solicitors, that subject to the approval of the Judge of said court the following shall be taken and considered as the abstract of the evidence in said cause, for the purposes of such appeal, and that the said abstract may be submitted to the Judge of said court upon this stipulation for approval without notice.

A. H. KENYON,
SEABURY MERRITT,

Solicitors for Complainant.

C. W. BUNN,
E. J. CANNON,
JAMES B. KERR,

Solicitors for Defendant Northern Pacific Ry. Co.

STILES W. BURR, and
JAMES B. KERR,

Solicitors for Defendant, Edward Rutledge Timber Co.

*In the District Court of the United States, for the District
of Idaho, Northern Division.*

ANDREW WEST,

Complainant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corpo-
ration, and EDWARD RUTLEDGE TIMBER COM-
PANY,

Defendants.

Abstract of Evidence.

The complainant Andrew West was called as a witness in his own behalf, and testified:

I was born in Finland. Am thirty-seven years of age, a naturalized citizen of the United States; that since the 15th day of May, 1903, I have been residing on the land in controversy; on the 15th day of May, 1903, I bought the cabin, improvements and rights of John Hanson upon said land for \$200.00, and have continuously resided thereon since that time; that I have been off of said lands to work for the purpose of earning some money for periods of one to two months; that I have had no other home or place of residence since that time; at that time there was about fifty square feet of clearing and a little cultivation; there were notices at each corner and a blazed line on all sides of said land at that time; I wrote and posted new notices at the corner of said land. During 1903 I made improvements upon said land by fixing up the house, making a trail and clearing more land; that since said time I have continued to clear additional land during each year and have cultivated and grown crops upon said land during each of said years; I have two and one-half acres in cultivation and four and one-half acres cleared; that I have a barn, house, wood-house, roothouse and toilet, and fruit trees planted and growing upon said land; the reasonable value of my im-

provements thereon is the sum of \$2800.00; it is a very rich dark brown soil and about one hundred (100) acres is suitable for cultivation; the land is covered with all kinds of trees, consisting of white pine, tamarack, yellow pine and seedlings, which timber is valuable as saw-timber; I found the foundation of an old cabin on the southeast quarter and two notices signed by Teat; there were no other blazes or notices of any kind upon said land; I never was informed that the defendants were claiming this land until I tendered my homestead application at the Coeur d'Alene Land Office; that the nearest place where I could trade was at St. Joe, which was twenty-eight miles.

Cross Examination.

I was born in Finland and came to this country January 1, 1901, direct to Wallace, Idaho. I worked in Wallace until the 10th day of May when I went on this homestead; I was looking for land and met John Hanson in Wallace; he was sick and had no money; he told me he would sell for \$200.00; he took me to the land and showed me the notice at the southeast corner, and we went along the blazed line a half a mile north and found a notice on that corner, and we turned a half mile west and there was a notice on that corner; we went a half mile south and found a notice there, and then went half a mile east and came to the same corner, and it was blazed all around that square; the notices were dated May, 1902, and signed John Hanson; he did not show me any corners or government lines that had been made by Government surveyors; I looked all over the land to see if anybody else had found it and I did not see any evidence that any other person claimed it. The Hanson house was 14 by 15 feet inside with one window; I built a new house in 1905 and am using the Hanson house for a barn; I declared my intention to become a citizen and took my first papers in the court house at Wallace in April, 1903, and received my citizen papers in Coeur d'Alene on the 17th day

of June, 1905; Hanson left the land on the 15th day of May, 1903, and went to Spokane to see a doctor; I remained on the land until the fall of 1904, except when I went to St. Joe and St. Maries for mail and supplies; during each trip I was never gone away from the land longer than three weeks; I might have been out fifteen or twenty times during that time, and when I could not get a pack horse to carry in supplies I packed them in myself; Ferrell and St. Joe are the two different names for the same post office, which has been my post office all of the time; my house furnished is worth a thousand dollars; the furniture is worth \$200.00 and the house \$800.00; the house I bought from Hanson is worth \$150.00; the root house is worth \$100.00; the wood house is worth \$50.00; the clearing of the land is worth \$300.00 an acre, and I have cleared two and a half acres; I raised eight sacks of potatoes last fall and about a hundred pounds of rutabagas and about a hundred pounds of turnips; I sold about fifty pounds of potatoes last year for three cents a pound. I am not married. When I am off the land I go to Wallace most of the time. If I could not get any outside work I go and work in the mines for a month or two. I left the land after Christmas, in 1904, and worked January and February to the middle of March cutting cord wood between Wallace and Wardner on the hills there; I had a contract for 200 cords; I have stayed on this land all through some winters and the snow is from five to seven feet deep, being seven feet this last winter, the deepest I ever saw it; in the middle of winter I can get in to and out from the land. The land is good farming land and anything grows fine on it; this land will be worth just as much after the timber is off as it is with the timber on; I could clear ten or fifteen acres a year if I had a little money to buy a little powder to shoot the stumps out and a team of horses, but I am compelled to spend the little money I earn to pay the expenses and attorneys to prevent the Lumber Company from taking the land from me; I took a stone and

timber claim in 1906 which I paid for and now own, which consisted of 160 acres, described as the northwest quarter of section 26, township 45 north, range 3 east, B. M.; I got \$3000.00 from my father's estate in 1905 which I loaned my brother and he bought 160 acres of land in Clarke county, Washington.

Re-Direct Examination.

When the official survey was made the surveyed lines running east and west were 40 rods from my old blazed lines and I was moved 40 rods west after the government survey and about 4 or 5 rods south.

Re-Cross Examination.

The government surveyors ran the north and south line between sections 20 and 21 on July 3, 1903, and I was right there. I was working right there when they came with the line and I got a map down so that I know when the land got surveyed. I never saw the surveyors run any other lines. I was busy working on clearing land, etc. The government surveyors were camped there on Marble Creek about a mile from my house for about a week.

JOHN DAVEGIO, a witness called and sworn on behalf of the complainant, testified as follows:

I am 66 years old; I have resided on Marble Creek for the last twelve or fifteen years on my homestead, which is about two miles distant more or less from Andrew West and is in section 16; I first met Andrew West in May, 1903, when he stopped at my place over night; I was first on his homestead in June 1903; there was a small clearing around his house; he was fixing his house that day; I was there again in September of that year; he was cutting brush and clearing; his garden was growing; he would come to my house often as it was on the trail and whenever a settler went out he would bring in everybody's mail and West would get his at my

place; I have seen Mr. West there during all of the years since 1903 until the fall of 1912; he has built a nice comfortable house in which he has the necessary furniture, also a wood house, root house, and some fence around the place; the land is good soil and good for cultivation when the timber is cleared and most of it can be cultivated. I have proved up on my homestead and have no interest in the result of this litigation.

Cross Examination.

I have proved up and sold out and gone away. I have stayed in there part of the winter sometime, not all the winter; I stayed there late in December many times, and I used to pull out during the December snow there.

Re-Direct Examination.

The first time that I ever heard that the defendants were clearing this land was when we came down to Coeur d'Alene to file in 1905.

Q. Did you ever make any inquiry at the Land Office to ascertain whether there was any claim against this land at any time?

A. I did.

Q. When was that?

COUNSEL FOR DEFENDANTS: You are inquiring as to the West land?

COUNSEL FOR COMPLAINANT: I will not limit it to that; to the lands on Marble Creek in the vicinity of this land including this land.

COUNSEL FOR DEFENDANTS: It seems to me that it is both immaterial and incompetent. He was on section 16, which was a state section and what the land officer told him about the southeast quarter of 20, in controversy with West, is certainly not admissible.

COUNSEL FOR COMPLAINANT: No, but as to this

land in this vicinity in general including this and other land.

COUNSEL FOR DEFENDANTS: All the more immaterial.

The COURT: I am not so clear that it would be material, but I shall overrule the objection and let it go in.

A. Yes, I did.

COUNSEL FOR COMPLAINANT: When was that?

A. That was in 190, in August sometime.

Q. Where did you go and what conversation did you have?

A. I made inquiry of the receiver in the land office here if there was anything against the land up in Marble Creek and I gave him the best description I could and asked him if any claims were being made to that land, and he looked at the record and told me there was nothing on record and said "the land is unsurveyed and subject to squatters' right. The government will protect you until it is surveyed."

I know John Hanson located on the West claim and was living there in the summer of 1902.

COUNSEL FOR DEFENDANTS: I assume, your Honor, that it is understood that all this testimony goes in under the objection which has been made?

The COURT: Yes.

OLAF EDIN, a witness called and sworn on behalf of the complainant testified as follows:

I am now and have been since 1901 living on Marble Creek in section 32, about two miles from Andrew West homestead; I have known Andrew West since the middle of the summer 1903; I was on his homestead in 1901 before anybody was living there, and was there in 1902 when John Hanson was living there; he had a cabin and a little clearing. I have been on West's homestead every year since 1903; the improvements continued to be better and the clear-

ings enlarged. I have seen Mr. West a number of time on his place, my place or on the trail since 1903; there has been a crop raised on the West homestead every year since that time and West has made his home there. His home was furnished and is as good as the average homesteader's house. He built his new house in 1905; it is well furnished, plastered, and papered; there are three or four acres cleared, and probably two acres in cultivation; I have never known of or seen any blazes, lines, monuments, notices, or anything that would indicate that the Railway Company or the Timber Company were claiming the West land by reason of having scripped it; there were no lines or evidences of a survey until the government surveyors came in there in 1903; the only lines prior to that were the blazed lines of the locators; these claims were all marked by having lines blazed around them; I helped run the lines around the West claim in 1901; there were no lines around it or notices posted upon it prior to that time; the line I blazed around this cabin varied from the survey about a quarter of a mile, or nearly a quarter one way, and the other way a few rods.

Cross Examination.

In running these lines we started at Marble Creek; we did not know where we were; we just started and made a certain point and started from there; we paced out these quarter section lines so that they would not be crooked, and we undertook to tie them up to the government lines which had already been run as near as we could. Of course it was an uncertain thing. The nearest government line that had been established when we started in to run these lines was distant about five miles; that line was the northeast corner of township 45, 44, 45, in 3 east, five miles from there; the southwest corner in that township was also set and the exterior lines of that township, 45-3, had been run, and we carried in our lines we carried them in from the south line

of township 45-3. We parcelled out these lands by quarter sections as near as we could bringing it to what would be the government survey but so as not to crowd settlers we might have made them a little larger than the government survey. I first heard about the Northern Pacific scrip in 1905 when I filed.

ANDREW WEST, the complainant, was thereupon recalled as a witness in his own behalf and testified as follows:

I did not own any land on the 17th day of July, 1905, when I made my application to file on my homestead; I made my stone and timber application in the fall of 1906. My brother bought the land in Clarke county, Washington, from Mr. Briggs for \$3000.00. I paid for it for him and it was deeded to me for security on September 28, 1908, and I conveyed it to my brother in April, 1912.

W. H. BATTING, called and sworn on behalf of the complainant, testified as follows:

I am the register of the United States Land Office at Coeur d'Alene. I have two tract books here; I have the old tract book and the new tract book transcribed in 1912; the loose leaf tract book is now the official tract book of the office; this was transcribed after our fire of 1911 on account of the condition of the old tract book.

COUNSEL FOR COMPLAINANT: Q. From either of these tract books can you ascertain whether any lands included therein have been classified as mineral or nonmineral in character?

A. Yes.

COUNSEL FOR COMPLAINANT: Q. Does the tract book show any classification as to section 20, township 44 north, range 3 east?

A. No, sir, the even sections are not classified.

COUNSEL FOR COMPLAINANT: Q. Were any even

numbered sections classified in the survey of that township?

A. I cannot answer that at present. I would have to get other records. I will say this though that I have noticed frequently in the record books that entries have been made of classifications of even sections, but I have always disregarded them because they are of no effect.

COUNSEL FOR COMPLAINANT: Q. What?

A. Because they have no effect whatever as to the status of the land.

COUNSEL FOR COMPLAINANT: Q. From the records in your office Mr. Batting, can you determine whether or not any classification as to mineral or nonmineral character has ever been made of this section 20 referred to?

A. Not at present, no. I used to have the original reports of the Commissioner, but they have been destroyed by fire. The official records would now have to be obtained from the General Land Office; that is, that applies to all the classifications in this district made by the Commissioner.

COUNSEL FOR COMPLAINANT: Q. From the records in your office has section 20, township 44 north, range 3 east, B. M., ever been classified as to the mineral or non-mineral character?

A. No, sir.

Cross Examination.

COUNSEL FOR DEFENDANTS: Q. Are you able to ascertain from an examination of the records in your office whether this section or any other even numbered section in that township has or has not been examined and classified by the department with respect to mineral or nonmineral character?

A. No, sir; I would like to explain that I could prior to the fire which destroyed our office in 1911, but not now.

Q. I will ask you to state whether or not it is a fact that the even numbered sections are classified as appears from those records and the odd numbered sections are not?

A. Just the reverse is true.

Q. The odd numbered sections are classified and the even are not?

A. Yes.

Q. But they do classify the odd numbered sections?

A. That is correct.

Q. And do not the even numbered sections; then I will ask you to state whether or not it is a fact that the record is silent upon the subject because the even numbered sections are in no event classified?

A. That is correct; I can explain to you a little further; In the old tract book of our office the classification of 44-3 east was entered at the beginning of the head of a township classified October, 1899, as mineral, approved March 26, 1901, and refers to General Land Office letter. That is the only entry in 44-3 East with reference to mineral or non-mineral classification.

Q. Now I will ask you to state if it is not a fact that the odd numbered sections of that township in your new record are classified as mineral?

A. Yes, all of them. I was going to explain when I started my explanation that the reason that was entered in the beginning of the township was because the classification applies only to odd sections.

COUNSEL FOR DEFENDANTS: The classification you speak of is the classification under the act of February 26, 1895?

COUNSEL FOR COMPLAINANT: We admit now that the records do not show that there was a classification of section 20.

Q. Then the fact that on these records here there is no classification with respect to section 20 does not indicate that there was no return or classification by the surveyor general in connection with the survey?

A. Oh, no; the surveyor general makes a return with respect to every survey, every section.

Q. With respect to whether it is mineral or not?

A. Yes.

Q. And you do not mean to be understood to testify that the records of your office indicate that there was no return on this section?

A. No, not at all.

Re-Direct Examination.

Q. Is there any way for you to tell from any record in your office as to whether the section of land in controversy has ever been classified by the surveyor general?

A. Not in my office at present; I can explain that that when the office was destroyed in 1911 we had those records and after the fire in re-establishing the office I requested that they be duplicated and the surveyor general has done part of the work but not completed it. This particular township has not been duplicated. I have no records of any classification of the original survey of the surveyor general. If I had the field notes I could give you that; they were destroyed by fire. No records of the tract books to which I have referred have been made up from the official plat and the official notes which I had in my office; the surveyor's return as to the character of the land was never entered in the tract book.

NEWTON J. GLOVER, called and sworn as a witness in behalf of the complainant, testified as follows:

I have resided on Marble Creek since 1901; I have known Mr. West since 1903; my homestead is the west half of the northwest quarter of the same section in which Mr. West's homestead is; I first saw him on his homestead in 1903; he was putting in his garden; he has made that his home since that time; he has raised a crop there each year since 1903; I never heard that the Railroad Company claimed this land prior to 1905; I went to the land office in July, 1901, and

made inquiry as to this land; there was nothing in the record about it; it was open for homestead settlement.

JOHN STEVENSON, called as a witness on behalf of the complainant testified as follows:

I live in section 29 adjoining the section in which Mr. West lives; the West land is good agricultural land after it is cleared; there could be 120 acres of it cultivated and farmed.

Defendants' Evidence.

LLOYD E. GILHAN, called as a witness on behalf of the defendants, testified as follows:

I reside in Portland, Oregon; am a timber cruiser and engineer; I have been engaged in the woods in this capacity since 1906, and am familiar with the location of government corners and lines, the taking of elevations and the cruising of timber; in April, 1913, I spent one day on the land claimed by Andrew West, the southeast quarter of section 20, township 44 north, range 3 east, B. M., and spent from April 9 to April 29, inclusive, upon this land and other land in the same vicinity; I made a survey of the southeast quarter of section 20 and took elevations, and by using an aneroid barometer I took the elevations of this land; I prepared the plat marked "Defendants' Exhibit No. 3," which shows the east half of section 20 and the west half of section 21, township 44 north, range 3 east, B. M.; this map correctly shows the elevations of the various points and subdivisions of lands shown on the map; the contour lines on this map are 50 feet apart, that is, each line is 50 feet higher or 50 feet lower than the next line; the highest point shown on the southeast quarter of section 20 is 3650 feet; this point is in the northeast quarter of the southeast quarter of section 20, and the lowest point is an elevation of 3,000 feet, giving a difference in elevation of 650 feet; the distance between the highest

point and lowest point laterally is 1980 feet; the west half of the southeast quarter of section 20 is steep, while the east half of the southeast quarter is practically level; the slope of the ground on the southeast quarter of section 20 runs from ten to forty-five degrees; the land is pretty heavily timbered; it is timbered with white pine and tamarack. In April, 1913, the land was covered with snow from four feet to twenty-five feet deep.

The following documentary evidence was introduced at the hearing of said cause:

There was introduced as COMPLAINANT'S EXHIBIT NO. 1, documents certified as copies by the commissioner of the General Land Office as follows:

1. Homestead application of ANDREW WEST, for the SE $\frac{1}{4}$ of Sec. 20, Twp. 44 North, Range 3 E., B. M., dated July 15th, 1905.

2. Affidavit of ANDREW WEST, under Act of Congress of August 30, 1890, in support of his homestead application, dated July 17, 1905.

3. Homestead affidavit of ANDREW WEST, dated July 17, 1905, in support of his homestead application.

4. Non-mineral affidavit of ANDREW WEST, dated July 17, 1905, in support of his homestead application.

5. Affidavit of ANDREW WEST, dated July 17, 1905, under Section 2289 of Revised Statutes of the United States, in support of his homestead application.

There was introduced as PLAINTIFF'S EXHIBIT NO. 2 documents certified as copies by the Commissioner of the General Land Office, as follows:

1. Rejection of Homestead Application of ANDREW WEST in words and figures as follows, to-wit:

"01261

Coeur d'Alene, Idaho, August 16th, 1905.

Andrew West,

St. Joe, Idaho.

Dear Sir:

Your application to make entry of SE $\frac{1}{4}$ Sec. 20, Tp. 44 N., R. 3 E., B. M., under the homestead law has been rejected for the reason that all of the lands applied for is embraced in the prior N. P. Ry. Co. list No. 61, Act March 2, 1899, filed June 21, 1901.

Thirty days from the above date are allowed you in which to appeal from the rejection of said application.

Yours truly,

Register."

2. *Letter of Authorization*, in words and figures as follows, to-wit:

"UNITED STATES LAND OFFICE,

Coeur d'Alene, Idaho.

01261

Andrew West,

vs.

Northern Pacific

Railway Co.—Authorization.

I, Andrew West do hereby authorize Messrs. Peacock, Wells & Ludden, to appear and represent me as my attorneys in all matters and things connected with the above entitled case.

ANDREW WEST."

3. *Notice of Appeal* by Peacock, Wells and Ludden, attorneys for Andrew West, to the Commissioner of the General Land Office from the rejection by the Register and Receiver of the Coeur d'Alene Land Office of the Homestead Application of Andrew West.

4. *Affidavit of Service* of Notice and Appeal on Northern Pacific Railway Company.

5. *Letter* from Register of Coeur d'Alene Land Office to Commissioner of General Land Office transmitting appeal of Andrew West from rejection of his homestead application.

6. *Petition* addressed to Secretary of Interior by Andrew West for a review and reconsideration of the decision of the Secretary of the Interior rendered July 24, 1898, adverse to Andrew West, signed by Andrew West and A. G. Kerns, his attorney.

7. *Affidavit* of good faith by Andrew West in support of his petition for review of decision of Secretary of Interior dated December 22, 1908.

8. *Supplementary Affidavit* by Andrew West dated April 20, 1909.

9. *Letter* from Commissioner of the General Land Office addressed to Secretary of Interior transmitting motion of West for review of Departmental Decision dated July 24, 1908.

10. *Letter* from Assistant Commissioner of General Land Office, dated April 29, 1909, to Register and Receiver, Coeur d'Alene, Idaho, stating that a motion for review has been filed in case of Andrew West versus Northern Pacific Railway Company, and directing Register and Receiver to suspend action in the same.

11. *Letter* dated April 29, 1909, from Commissioner of General Land Office to Secretary of Interior, transmitting motion for review of Departmental Decision dated July 24, 1908.

12. *Letter* dated May 13, 1909, from Commissioner of General Land Office to Hon. W. B. Heyburn, setting forth the status of the land covered by Homestead Application of Andrew West rejected for conflict with a prior selection of the tract by the Northern Pacific Railway Company.

13. *Letter* dater May 24, 1909, from Butler and Vale, attorneys, enclosing affidavit and petition for review of Andrew West involving land covered by Homestead Application of West.

14. *Letter* from First Assistant Secretary of Interior to Commissioner of the General Land Office, in words and figures as follows, to-wit:

"K. M. T.
D-7138.

281730-18

G. B. G.

DEPARTMENT OF THE INTERIOR
WASHINGTON.

June 9, 1909.

Andrew West,

v.

Northern Pacific Railway Co.

Motion for Review—Entertained.

Coeur d'Alene 01261

F.

The Commissioner of the
General Land Office.

Sir:

RECEIVED

JUN 11

1909.

This is a motion on behalf of Andrew West for review of so much of departmental decision of September 5, 1908, (erroneously described in the motion as departmental decision dated July 24, 1908,) as affirmed your office decision of January 5, 1907, holding that the right of the Northern Pacific Railway Company to select certain unsurveyed lands described in its lists Nos. 61, 63 and 65, and adjusted to the line of the public surveys, when made, was superior to that of the homestead claimant, West, involving the SE $\frac{1}{4}$ Sec. 20, T. 44 N., R. 3 E., Coeur d'Alene land district, Idaho.

Upon careful consideration of the motion it appears that sufficient ground is shown for entertaining the same. I

therefore herewith transmit said motion and direct that the same be returned to West, notifying him that it will be considered, provided he will serve upon the Northern Pacific Railway Company a copy thereof and all accompanying papers, together with a copy of this order, and return the papers with evidence of service, within thirty days from receipt hereof.

In entertaining this motion the Department desires to hear argument mainly upon two propositions: (1) the alleged insufficiency of description of the base lands upon which original selections herein rested; and (2) the allegations that a new base was substituted after the original selection was made, and after West had initiated his settlement claim to said land.

Very respectfully,

FRANK PIERCE,
First Assistant Secretary.

15. *Letter* dated June 25, 1909, from Assistant Commissioner of General Land Office to Register and Receiver directing service of motion for review on Northern Pacific Railway Company.

16. *Letter* dated January 5, 1910, from Kerns and Ryan, attorneys, addressed to Register and Receiver, Coeur d'Alene, Idaho, enclosing proof of service of motion for review on Northern Pacific Railway Company.

17. *Affidavit* of John F. Moffatt, dated January 5, 1910, showing service of petition for review on Northern Pacific Railway Company.

18. *Letter* dated January 10, 1910, from Receiver of Coeur d'Alene Land Office to Commissioner of General Land Office, transmitting proof of service of motion for review on Northern Pacific Railway Company.

19. *Argument* filed in United States Land Office at Coeur

d'Alene, Idaho, on January 28, 1910, by Kerns and Ryan, attorneys for Andrew West, in support of petition for rehearing addressed to the Secretary of the Interior.

20. *Affidavit* of A. T. Ryan, dated January 26, 1910, showing service of argument in support of petition for rehearing on Northern Pacific Railway Company.

21. *Letter* dated January 31, 1910, from Receiver of Coeur d'Alene Land Office to Commissioner of General Land Office transmitting argument on rehearing filed in Coeur d'Alene Land Office on January 28, 1910, by Kerns and Ryan, attorneys.

22. *Letter* dated February 5, 1910, from Assistant Commissioner of General Land Office to Secretary of Interior returning record in the case of Andrew West versus Northern Pacific Railway Company as directed by departmental letter of June 9, 1909.

23. *Letter* dated February 5, 1910, from Acting Assistant Commissioner of the General Land Office to Register and Receiver, Coeur d'Alene, advising that record in case of Andrew West versus Northern Pacific Railway Company has been forwarded to the Department on motion filed for review of departmental decision of September 5, 1908.

24. *Letter* dated February 5, 1910, from Acting Assistant Commissioner of General Land Office to Butler and Vale, notifying them that record in case of Andrew West versus Northern Pacific Railway Company has been forwarded to the Department on motion filed for review of departmental decision of September 5, 1908.

25. *Letter* dated February 5, 1910, from Acting Assistant Commissioner of General Land Office to Messrs. Britton and Gray, advising them that record in case of Andrew West versus Northern Pacific Railway Company has been forwarded to the Department on motion filed for review of departmental decision of September 5, 1908.

26. *Letter* dated February 18, 1910, from Assistant Commissioner of General Land Office to Secretary of Interior transmitting letter of Receiver of Coeur d'Alene Land Office of January 31, 1910, enclosing brief filed on behalf of West.

27. *Letter* dated February 23, 1910, from Britton and Gray, to Secretary of Interior, filing reply brief on behalf of the Northern Pacific Railway Company in the case of Andrew West versus said company.

28. *Brief* filed by Britton and Gray, attorneys for Northern Pacific Railway Company, in case of Andrew West versus Northern Pacific Railway Company on motion for review by West of the decision of the Secretary of Interior of July 24, 1908.

29. *Affidavit* of Edward Jackson dated February, 1910, showing service of reply brief on A. G. Kerns, attorney for Andrew West.

30. *Letter* from First Assistant Secretary of the Interior to the Commissioner of the General Land Office, dated February 16, 1910, which letter is in words and figures as follows, to-wit:

281730—46

LLB. DEPARTMENT OF THE INTERIOR, G.B.G.
WASHINGTON.

Address only

The Secretary of the Interior.

Mar. 16, 1910.

D-7138

FWC

Coeur d'Alene

01261

ANDREW WEST,

v.

NORTHERN PACIFIC RAILWAY CO.

Received
Mar 19 1910.
G. L. O.

Motion for Review Denied.

The Commissioner of the General Land Office.

Sir: This is a motion on behalf of Andrew West for review of departmental decision of September 5, 1908, sustaining the claim of the Northern Pacific Railway Company and rejecting the settlement claim of the said West, for the SE $\frac{1}{4}$ Sec. 20, T. 44 N., R. 3 E., Coeur d'Alene land district, Idaho.

This case is in all essential respects the same as the case of August Hanson et al v. Northern Pacific Railway Company, in which a motion for review, filed by Hanson, has been this day denied. For the reasons therein stated, the motion herein is denied, and the papers are herewith transmitted for the files of your office.

Very respectfully,

FRANK PIERCE,

First Assistant Secretary.

31. *Letter* dated March 30, 1910, from Acting Assistant Commissioner of General Land Office at Butler and Vale, enclosing copy of departmental decision dated March 16, 1910, denying West's motion for review.

32. *Letter* dated March 30, 1910, from Acting Assistant Commissioner of General Land Office to Messrs. Britton and Gray, enclosing copy of decision dated March 16, 1910, denying West's motion for review.

33. *Letter* from Assistant Commissioner of General Land Office, dated March 30, 1910, to Register and Receiver of United States Land Office at Coeur d'Alene, Idaho, transmitting letter of Secretary of Interior of March 16, 1910.

34. *Election* of Andrew West to make proof, in words and figures as follows, to-wit:

"RECEIVED

Sept. 13,
1912

281730—5

01261

U. S. LAND OFFICE

COEUR D'ALENE, IDAHO.

ELECTION TO MAKE PROOF

UNDER LAW UNDER WHICH ENTRY WAS MADE.

Act of June 6, 1912 (Public, No. 179)

Marble Creek, Idaho,

Sept. 10th, 1912

Register and Receiver,

United States Land Office,

Coeur d'Alene, Idaho.

Sirs:

On the 17th of July, 1905, I made Homestead Entry No. for S. E. $\frac{1}{4}$ Sec. 20, T. 44, N. R. 3 E., Boise Meridian.

Under the privilege allowed by Section 2291, U. S. R. S., as amended by the Act of June 6, 1912 (Public, No. 179), I hereby give notice that I elect to make proof on said entry under the law under which the same was made.

My postoffice address is St. Joe, Idaho.

ANDREW WEST.

There was introduced as PLAINTIFF'S EXHIBIT NO. 3 a document certified as a copy by the Commissioner of the General Land Office, being a selection list of the Northern Pacific Railway Company, which document is in words and figures as follows, to-wit:

ACT OF MARCH 2ND, 1899

Filed June 21, 1901

D. H. Budlong,

Register.

Approved June 21, 1901.

LAND DEPARTMENT
NORTHERN PACIFIC RAILWAY COMPANY
List No. 61 (lieu)
OF SELECTIONS OF PUBLIC LANDS MADE BY THE
NORTHERN PACIFIC RAILROAD COMPANY
AS INURING TO IT UNDER GRANTS OF JULY 2, 1864,
AND MAY 31, 1870, IN THE
COEUR D'ALENE U. S. LAND DISTRICT
IDAHO.

July 18, 1911	To H. W. Rich and John King by Act- ing Secy. copy here- to attached.	Posted July 22-1901 K. L. C. 9-20-10 Base Posted. Van D. o Wood.
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a-2

LAND DEPARTMENT
NORTHERN PACIFIC RAILWAY COMPANY.
LIST No.
61.

STATE OF IDAHO.
U. S. Land Office at
Coeur d'Alene.

The Northern Pacific Railroad Company and the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, having executed and delivered to the United States their certain deed, dated July 19, 1899, conveying and relinquishing to the United States certain lands situated within the limits of the Mount Ranier National Park and the Pacific Forest Reserve, as defined by the Act of Congress entitled "An Act to set aside a portion of certain lands in the state of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," which Act

was approved March 2, 1899, in pursuance of said Act of Congress above mentioned, now, by virtue of the right conferred upon the said Northern Pacific Railroad Company by said Act of Congress approved March 2, 1899, the said Northern Pacific Railway Company as the successor in interest of the Northern Pacific Railroad Company, hereby selects the lands hereinafter specified in lieu of a like quantity of lands so relinquished and conveyed. The descriptions hereinafter set opposite the lands selected being assigned as the particular bases for the tracts hereby selected.

All the lands hereby selected are situated within the Coeur d'Alene land district, in the state of Idaho.

LIST OF LANDS north of base line and east of Boise Principal Meridian, selected by the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," in lieu of lands set opposite thereto, relinquished under said act of March 2, 1899.

Part of Section	Sec.	Town.	Range	Area Acres-100ths	Remarks
-----------------	------	-------	-------	----------------------	---------

The following tracts of land which when surveyed will be described as follows:

1	All	14	44	2	640
2	All	22	"	"	640
3	W $\frac{1}{2}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$, W $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$, and S $\frac{1}{2}$ SE $\frac{1}{4}$	26	"	"	440
4	W $\frac{1}{2}$	6	43	3	320
5	E $\frac{1}{2}$	18	44	3	320
6	All	20	"	"	640
7	NE $\frac{1}{4}$	30	"	"	160
8	NE $\frac{1}{4}$ SW $\frac{1}{4}$ and S $\frac{1}{2}$ SW $\frac{1}{4}$	30	"	"	120
9	E $\frac{1}{2}$	32	"	"	320
10	W $\frac{1}{2}$	32	"	"	320
TOTAL					3920 Acres

LIST OF LANDS RELINQUISHED to the United States by the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and specified as bases for the particular tracts set opposite and hereby selected.

Part of Section	Sec.	Town.	Range	Area	Remarks
				Acres-100ths	

The following tracts of land which when surveyed will be described as follows:

		North	East	W.M.	
1	All	31	18	8	640
2	All	33	"	"	640
3	S $\frac{1}{2}$ NE $\frac{1}{4}$, W $\frac{1}{2}$ & NE $\frac{1}{4}$ SE $\frac{1}{4}$	29	"	"	440
4	E $\frac{1}{2}$	35	"	"	320
5	W $\frac{1}{2}$	35	"	"	320
6	All	11	13	11	640
7	NE $\frac{1}{4}$	9	"	"	160
8	NW $\frac{1}{4}$ SE $\frac{1}{4}$ & S $\frac{1}{2}$ SE $\frac{1}{4}$	29	18	8	120
9	W $\frac{1}{2}$	9	13	11	320
10	S $\frac{1}{2}$	31	17	12	320
TOTAL				3,920	Acres

State of Minnesota,
County of Ramsey.—ss.

I, Wm. H. Phipps, being duly sworn, depose and say: that I am the Land Commissioner of the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company; that the lands described in the foregoing list, and which are hereby selected by the Northern Pacific Railway Company, under the Act of Congress approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and all of them, are vacant, unappropriated lands of the United States, not reserved, and to which no adverse right or claim has attached, and have been found, upon examination, to

to be non-mineral in character; and said lands, and all thereof, are of the character contemplated by said Act of Congress approved March 2, 1899; and that the specific lands heretofore relinquished and conveyed to the United States by said Northern Pacific Railway Company, as successor in interest of the Northern Pacific Railroad Company, in lieu of which the lands herein described are selected, are truly set forth and described in this list, and no selection has heretofore been made in lieu of any of the lands herein specified as the basis for the lands hereby selected.

WM. H. PHIPPS (Seal)

Subscribed and sworn to before me this 17th day of June, 1901. W. F. von Deyn. Notary Public, Ramsey County, Minnesota.

U. S. Land Office at Coeur d'Alene, Idaho,

Jun 21, 1901

We hereby certify that we have carefully examined the foregoing selection list filed by the Northern Pacific Railway Company, as the successor of the Northern Pacific Railroad Company, under the act of Congress approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and have critically examined the plats and records of this office, and that the lands selected appear by the records of this office to be subject to such selection; and said lands, and all of them, are public lands of the United States, not reserved, and to which no adverse right or claim has attached. We have therefore approved the foregoing list and the selection of the lands therein described, and have made due notation thereof upon the records of this office.

It is further certified that the foregoing list shows an assessment of the fees payable hereunder, and that said

Northern Pacific Railway Company has paid to the undersigned, the receiver, the full sum of fifty dollars in full payment and discharge of said fees.

D. H. BUDLONG, Register.

C. D. WARNER, Receiver.

The foregoing, Plaintiff's Exhibit 3, was also introduced in evidence by the defendants.

There was introduced as PLAINTIFF'S EXHIBIT NO. 4 a document certified as a copy by the Commissioner of the General Land Office, being a list filed by the Northern Pacific Railway Company describing anew the lands selected by Coeur d'Alene List No. 61 which exhibit is in words and figures as follows, to-wit:

ACT OF MARCH 2, 1899.

Describing anew the lands selected by

Coeur d'Alene List No. 61 (In part)

so as to conform with the United States Survey thereof.

FORM L. D. 153

FILED JULY 31, 1905.

Approved.....

LAND DEPARTMENT

NORTHERN PACIFIC RAILWAY CO.

LIST NO. 61 (In part).

OF SELECTIONS OF PUBLIC LANDS MADE BY THE
NORTHERN PACIFIC RAILWAY COMPANY

As inuring to it under Grants of July 2, 1864

and May 31, 1870, in the

Coeur d'Alene U. S. Land District

IDAHO.

Posted Dec. 16, 1905.

Sept. 21-05

S. W. M.

Item 10, Base Posted Van D.

"C"

adj. to survey item 8—Noted Van D. o

WHEREAS, by authority granted by an Act of Congress

entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve as a public park, to be known as the Mount Rainier National Park," approved March 2nd, 1899, the Northern Pacific Railway Company, the successor in interest to the Northern Pacific Railroad Company, did on the 21st day of June, 1901, select in the United States District Land Office at *Coeur d'Alene*, Idaho, certain lands in *townships numbered 44 north, ranges 2 and 3 east*, Boise Meridian, as described in its *selection list numbered 61*, which said lands at the date of said selection were unsurveyed public lands; and

WHEREAS, by section four (4) of the Act of Congress hereinbefore referred to, it is provided that in case the lands selected thereunder be unsurveyed at the date of said selection, the company selecting the same shall within a period of three months after the lands so selected have been surveyed and plats thereof filed by said local land office, file a new list describing the lands selected according to the Government survey.

NOW THEREFORE, in conformity with this provision and for the purpose of so describing said lands selected that they will conform to the government descriptions thereof according to said survey, the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, does hereby describe anew the lands included in said selection list as follows, to-wit:

LIST OF LANDS north of base line and east of Boise principal meridian, selected by the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as

the Mount Rainier National Park," in lieu of lands set opposite thereto, relinquished under said act of March 2, 1899.

Part of Section		Sec. Town. Range		Area	Remarks
				Acres-100ths	
1	All	14	42	2	640
2	All	22	"	"	640
3	W $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ W $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ & S $\frac{1}{2}$ SE $\frac{1}{4}$	26	"	"	440
4					
5	E $\frac{1}{2}$	18	44	3	320
6	All	20	"	"	640
7	NE $\frac{1}{4}$	30	"	"	160
8	NE $\frac{1}{4}$ SW $\frac{1}{4}$	30	"	"	115.14
9	E $\frac{1}{2}$	32	"	"	320
10	W $\frac{1}{2}$	32	"	"	320
					<u>3595.14</u>

LIST OF LANDS RELINQUISHED to the United States by the Northern Pacific Railway Company, the successor in interest of the Northern Pacific Railroad Company, under the Act of Congress, approved March 2, 1899, entitled "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," and specified as bases for the particular tracts set opposite and hereby selected.

Part of Section	Sec.	Town.	Range	Area	Remarks
				Acres-100ths	

Those certain tracts of land which when surveyed will be described as follows:

		North	East	W.M.	
1	All	31	18	8	640
2	All	33	"	"	640
3	S $\frac{1}{2}$ NE $\frac{1}{4}$ W $\frac{1}{2}$ & NE $\frac{1}{4}$				
	SE $\frac{1}{4}$	29	"	"	440
4					
5	W $\frac{1}{2}$	35	18	8	320
6	All	11	13	11	640
7	NE $\frac{1}{4}$	9	"	"	160
8	NW $\frac{1}{4}$ SE $\frac{1}{4}$ & S $\frac{1}{2}$				
	SE $\frac{1}{4}$	29	18	8	120
9	W $\frac{1}{2}$	9	13	11	320
10	E $\frac{1}{2}$ SW $\frac{1}{4}$	27	15	11	80
	N $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$				
	N $\frac{1}{2}$ SE $\frac{1}{4}$ & SE $\frac{1}{4}$ SE $\frac{1}{4}$	33	"	"	240

The foregoing list designating anew so as to conform with the public surveys thereof the lands selected in

Coeur d'Alene List No. 61 (in part)

was filed in this office by the Northern Pacific Railway Company on the 31st day of July, 1905.

R. N. DUNN,

Register.

C. D. WARNER,

Receiver.

The foregoing Complainant's Exhibit 4 was also introduced in evidence by the defendants.

Thereupon the plaintiff offers in evidence a document in words and figures as follows, to-wit:

COMPLAINANT'S EXHIBIT NO. 7.

No. 552

B
CRGO

4-207

Filed June 9, 1913
A. L. Richardson,
Clerk.DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE.

WASHINGTON, D. C., May 6, 1913.

I hereby certify that the annexed copy of letter is a true and literal exemplification from the original in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

FRED DENNETT,

Commissioner of the General Land Office.

(United States General Land Office Seal.)

In reply please refer to Coeur d'Alene 01261 "C" RSC
R S C

J H D
F R D
D K PDEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE

WASHINGTON, May 6, 1913.

Address only the
Commissioner of the
General Land Office.

Mr. A. H. Kenyon,
827 Old National Bank Building,
Spokane, Washington.

Sir:

Hon. W. E. Borah, United States Senate, has left at this office a letter which you addressed him April 25, 1913. You

transmitted to Mr. Borah with your letter certified copies of certain papers identified by this office as Coeur d'Alene 01261.

You state that you desire the Commissioner of this office to execute a certificate to be attached to these papers, stating in substance, that they are copies of the complete record in the case of Andrew West for the SE $\frac{1}{4}$ Sec. 28, T. 44 N., R. 3 E., B. M., Idaho.

This office is authorized by statutes to furnish certified copies of books, records, papers, documents, maps, plats, etc., but cannot certify to facts or conclusions. Obviously, it could not certify that a certain record contained all papers which may have been considered by the Secretary of the Interior in the adjudication of a case. It may be stated, however, that the copies furnished you were certified copies of all the papers in the case which are found in the general files of the office.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner.

5-6-VEW

Thereupon counsel for the defendants interposed the following objection:

"This is objected to upon the ground that it is immaterial, incompetent, and not evidence of the facts therein stated. This is a letter, if your Honor please, addressed to the attorneys for the plaintiff. It says 'This office is authorized by statute to furnish certified copies of books, records, papers, documents, plats, etc., but cannot certify as to facts or conclusions. Obviously it could not certify that a certain record contained all papers which may have been considered by the Secretary of the Interior in the adjudication of the case'."

Documentary evidence was introduced at the hearing on behalf of the defendant as follows:

That certain plat referred to in the testimony of the witness LLOYD GILHAM contained in the foregoing abstract, which was marked DEFENDANT'S EXHIBIT 3, the original of which is returned herewith.

There were also offered in evidence on behalf of the defendants certain decisions in the case of *August Hanson* versus *Northern Pacific Railway Company*, referred to in the decision of the Secretary of the Interior, of March 16, 1910, above set forth, rejecting the motion for review of Andrew West upon the ground that it was controlled by the decision in the case of *August Hanson* versus *Northern Pacific Railway Company*.

The decisions in the Hanson case certified as copies by the Commissioner of the General Land Office were marked "DEFENDANT'S EXHIBIT NO. 11," and are as follows:

1. *Letter* from First Assistant Secretary of the Interior to Commissioner of the General Land Office dated June 9, 1909, entertaining a motion for review, which letter is in words and figures as follows, to-wit:

K. M. T. 313136-1A G. B. G.

DEPARTMENT OF THE INTERIOR.

D-578 WASHINGTON. June 9, 1909.

August Hanson, et al.

V.

Northern Pacific Railway Co.

Motion for Review—Entertained.

RECEIVED

JUN 14

1909

GLO

Coeur d'Alene 01259

F

The Commissioner of the
General Land Office.

Sir:

This is a motion on behalf of August Hanson for review of so much of departmental decision of September 5, 1908 (erroneously described in the motion as departmental decision dated July 24, 1908) as affirmed your office decision of January 5, 1907 holding that the right of the Northern Pacific Railway Company to select certain unsurveyed lands described in its lists Nos. 61, 63 and 65, and adjusted to the lines of the public surveys, when made, was superior to that of the homestead claimant, Hanson, involving the W $\frac{1}{2}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, and NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 21, T. 44 N., R. 3 E., Coeur d'Alene Land District, Idaho.

Upon careful consideration of the motion it appears that sufficient ground is shown for entertaining the same. I therefore herewith transmit said motion, and direct that the same be returned to Hanson, notifying him that it will be considered, provided that he will serve upon the Northern Pacific Railway Company a copy thereof and all accompanying papers, together with a copy of this order, and return the papers with evidence of service, within thirty days from receipt hereof.

In entertaining this motion the Department desires to hear argument mainly upon two propositions: (1) the alleged insufficiency of description of the base lands upon which the original selections herein rested; and (2) the allegation that a new base was substituted after the original selection was made, and after Hanson had initiated his settlement claim to said land.

Very respectfully,

FRANK PIERCE,
First Assistant Secretary.

2. *Letter* dated March 16, 1910, from First Assistant Secretary of Interior to Commissioner of General Land Office, denying motion for review, which letter is reported in the decisions of the Secretary of the Interior in Volume 38, Land Decisions, at page 491.

There was also introduced as DEFENDANT'S EXHIBIT 8 a certified copy of a letter from the Commissioner of the General Land Office to the Register and Receiver at Coeur d'Alene, Idaho, dated January 25, 1907, rejecting the application of Andrew West, which letter is in words and figures as follows, to-wit:

"380-p. 40

313136-1x

COPY

"F"

15-14579 DEPARTMENT OF THE INTERIOR

F I W

GENERAL LAND OFFICE

WASHINGTON, D. C. January 5, 1907

Address only the

Commissioner of the General Land Office.

Register and Receiver,

Coeur d'Alene, Idaho.

Sirs:

The plat of survey of T. 44 N., R. 3 E., was filed in your office July 17, 1905, and on the following day the State of Idaho applied to select, per common school indemnity list No. 4, under section four of the act of July (8) 3, 1890, the E $\frac{1}{2}$ Sec. 18, NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 19, all Secs. 20 and 21, W $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 22, W $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 27, all Sec. 28, E $\frac{1}{2}$ SW $\frac{1}{4}$, lot 4, and E $\frac{1}{2}$ Sec. 30, all Sec. 32, E $\frac{1}{2}$ Sec. 33, S $\frac{1}{2}$ NW $\frac{1}{4}$ and S $\frac{1}{2}$ Sec. 34, which application you rejected because all the lands applied for are embraced in prior selections of the Northern Pacific Railway Company, per lists Nos. 61, 63 and 65. From said rejection the State appealed.

It appears that on June 21, 1901, while the land was unsurveyed said company selected the E $\frac{1}{2}$ Sec. 18, all Sec. 20, NE $\frac{1}{4}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SW $\frac{1}{4}$ and NE $\frac{1}{4}$ Sec. 30, and all Sec. 32, per list No. 61. July 1, 1901, selected all Sec. 21, W $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 22, W $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 27, all Sec. 28, E $\frac{1}{2}$ Sec. 33, S $\frac{1}{2}$ NW $\frac{1}{4}$ and S $\frac{1}{2}$ Sec. 34, per list No. 63, and on July 2, selected the NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 19 and SE $\frac{1}{4}$ Sec. 30, per list No. 65, all under the provisions of the act of March 2, 1899 (30 Stat., 597, 628).

A number of homestead applications were presented on the same day the township plat was filed covering lands embraced in the State's application, which were also rejected for conflict with the prior selection of the land by the railway company and from said rejection each applicant appealed, viz.,

George W. Hayes, NE $\frac{1}{4}$ Sec. 18. Settlement and continuous residence alleged since June 1, 1903. Improvements \$200.

* * * * *

Andrew West, SE $\frac{1}{4}$ Sec. 20. Settlement and continuous residence since June 15, 1903. Improvements about \$300.

* * * * *

August Hanson, W $\frac{1}{2}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$ and NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 21. Settlement and continuous residence since September 14, 1901. Improvements about \$400.

* * * * *

July 31, 1905, the company filed a new list No. 61 and on August 30, 1905, filed new lists Nos. 63 and 65 describing the selected tracts in accordance with the plat of survey as required by section 4 of the act of March 2, 1899, *supra*.

The company filed a motion to dismiss the State's appeal on the ground (1) that the same was not filed within the time prescribed by the Rules of Practice and (2) it did not describe the lands with sufficient accuracy for the com-

pany to know what particular tracts are included in the case.

Notice of the rejection of the State's application was sent by registered letter on July 27, 1905, and the appeal was filed August 31, 1905. Said appeal was therefore within time. Further, the lands were described as being in T. 44 N., R. 3 E. and while the particular tracts applied for were not designated, it was sufficient notice to the company of the adverse claim asserted by the State. The motion to dismiss is denied.

It is contended that the tracts here in question were classified as mineral lands, and that the company's selection thereof is invalid. It is further claimed in behalf of the State, that the State had an absolute prior right of selection of the lands under the act of August 18, 1894 (28 Stat., 372, 394), extending from the time of the Governor's request for the survey of the land until the expiration of sixty days from the filing of the township plat of survey.

This land is within the indemnity limits of the company's grant under the act of July 2, 1864 (13 Stat., 365), and while unsurveyed it was classified as mineral land by the Board of Land Commissioners appointed under the act of February 26, 1895, during the month of October, 1899, which classification received departmental approval March 26, 1901.

The Board of Land Commissioners were instructed June 25, 1895 (20 L. D., 571) to "examine for the purpose of classification odd-numbered sections within the grant only." The classification of the even-numbered sections was unauthorized and can not be held as effecting their character.

The act of March 2, 1899, *supra*, authorized the company to select in lieu of the lands relinquished.

"An equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual government

survey, which has been or shall be made of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection," etc.

The subdivisional survey of this township was made in July, 1903, and the deputy surveyor who made the survey reported that the land if cleared would be suitable for grazing, but at present is more valuable for its timber. This was clearly a non-mineral return and the classification of October, 1899, can not be considered a classification of the lands as mineral at the time of actual government survey within the meaning of the act of March 2, 1899, *supra*. See *St. Paul, Minneapolis and Manitoba Ry. Co.* (34 L. D., 211) construing the act of August 5, 1892, containing a similar provision.

It appears that the Governor of Idaho applied for the survey of T. 44 N., R. 3 E., with a number of other townships, some of which were included in a previous application, that the application was filed in the United States Surveyor General's office at Boise, Idaho, July 8, 1901, and was forwarded to this office July 10, 1901. This application was duly followed by publication of notice thereof within the time prescribed by the act but no withdrawal appears to have been ordered thereon. The reservation under the act of August 18, 1894, was ineffective as to the lands which had been selected by the company prior to the filing of the Governor's application for survey.

The company had the right to select the lands while unsurveyed and after the filing of the township plat it completed its selection within the time prescribed by the act of March 2, 1899.

The company's claim to these lands under its selection, lists 61, 63 and 65, is clearly superior to that of the State and as to those applicants whose claims were initiated subsequent to the filing of the original lists 61, 63 and 65.

Accordingly your rejection of the State's application to select and of the homestead applications of said Hayes, Johnson, Nystrom, Strobel, West, David, Hanson, Risley, H. R. Estes, Rising, H. E. Estes, Curtis, Logan, Perkins, Edin, Dobbins and Mandell, so far as they cover lands embraced in said State's application is hereby sustained, subject to the right of appeal.

With regard to the claims of said Glover, Root, Theriault, Cheney, Scheave, Stoddard and Davies, the applicants submitted affidavits duly corroborated, alleging as shown above, settlement prior to the original selection by the company and in view of the prima facie showing made by these applicants, they will in the event this decision rejecting the State's application becomes final be given an opportunity to show their right to the land.

This land is within the limits of the withdrawal ordered by the president's proclamation of November 6, 1906, for the Coeur d'Alene Forest Reserve but as it was included in the prior selection by the company it was not affected by said withdrawal.

The claims of Nystrom, Glover, Cheney, Perkins, Mandell and Theriault to the tracts in Secs. 19, 29, 31 and 35, not covered by the State's application herein considered, will be considered in the cases pending involving such tracts.

Advise the State's authorities and homestead applicants hereof. The resident attorneys for the company will be advised by this office.

Very respectfully,

W. A. RICHARDS,
Commissioner.

FEZ

There was also introduced certified copy of a letter from the Secretary of the Interior to the Commissioner of the General Land Office, dated September 5, 1908, affirming the action of the Commissioner in rejecting the homestead application of West, which letter was marked DEFENDANTS' EXHIBIT NO. 12, which letter is reported in the Decisions of the Secretary of the Interior in Volume 37, Land Decisions, page 135.

There was also introduced as DEFENDANTS' EXHIBIT NO. 10, a certified copy of the patent of the United States to the Northern Pacific Railway Company, which EXHIBIT omitting lands described therein and not involved in this suit, is in words and figures as follows, to-wit:
Instrument Number 23932

THE UNITED STATES OF AMERICA,
To all to whom these presents shall come,
GREETING:

WHEREAS, by the act of Congress approved July 2, 1864, entitled, "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast, by the Northern Route," and the joint resolution of March 31, 1870, there was granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line and branch, to the Pacific Coast, "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States has full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is

definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office;" and

Whereas, official statements from the Secretary of the Interior have been filed in the General Land Office, showing that the Commissioners appointed by the President, under the provisions of the fourth section of the first-named act, have reported to him that the said Northern Pacific Railroad and Telegraph line, and branch, excepting that portion between Wallula, Washington, and Portland, Oregon, declared forfeited by the Act of September 29, 1890, have been constructed and fully completed and equipped in the manner prescribed by the act relative thereto, and the same accepted by the President; and

Whereas, by the Act of Congress approved March 2, 1899—30 Stat., 993—authority is given the Northern Pacific Railroad Company, now Northern Pacific Railway Company, to release and convey by proper deed to the United States the lands within Mount Rainier National *Part* and Pacific Forest Reserve theretofore granted to said Company, whether surveyed or unsurveyed, and to select in lieu thereof an equal quantity of non-mineral public lands, so classified as non-mineral at the time of the actual government survey thereof, lying within any State into or through which the railroad of said company runs; and it is provided that patent shall issue to said company for lands so selected; and

Whereas, the said lands lying within the said Mount Rainier National Park and Pacific Forest Reserve, and the limits of the grant to said railroad company, have been duly released to the United States by the Northern Pacific Railroad Company, the Northern Pacific Railway Company, and the Central Trust Company of New York, and the release has been accepted by the Secretary of the Interior; and

Whereas, there has been filed in the office of the Secretary of the Interior evidence showing that the Northern Pacific Railway Company is the lawful successor in interest of the Northern Pacific Railroad Company as to all lands within the limits of the grant made to the said Northern Pacific Railroad Company by the act of July 2, 1864, and all subsequent legislation; and

Whereas, the following-described selected land has been duly selected by the authorized agent of the Northern Pacific Railway Company, under the provisions of the act of March 2, 1899, aforesaid, and the lands given as bases therefor are within the primary limits of the Company's grant and lie opposite the constructed line of its road, and are also within the limits of the Reserves to the United States as aforesaid, to-wit:

BOISE MERIDIAN—IDAHO.

* * * * *

Township Forty-four North of Range Three East.

The east half of Section Twenty.

* * * * *

NOW KNOW YE, that the United States of America, in consideration of the premises, and pursuant to said acts of Congress, has given and granted, and by these presents does give and grant, unto the said Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company, its successors and assigns, the tracts of land selected as aforesaid and embraced in the foregoing.

TO HAVE AND TO HOLD the said tracts, with the appurtenances thereof, unto the said Northern Pacific Railway Company, successor as aforesaid, and to its successors and assigns, forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized

and acknowledged by the local customs, laws and decisions of courts, and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, William H. Taft, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the thirteenth day of October in the year of our Lord one thousand nine hundred and ten and of the Independence of the United States the one hundred and thirty-fifth.

By the President: WM. H. TAFT.

By A. S. STUMP, Assistant Secretary.

(Seal of the General Land Office) H. W. SANFORD,
Recorder of the General Land Office.

Recorded: Patent Number 157733.

Recorded at the request of G. H. Plummer, Nov. 15, 1910,
at 9 o'clock a. m. Stanley P. Fairweather, County Recorder.
By John P. Sheehy, Deputy.

The foregoing is, pursuant to stipulation attached, approved as the abstract of the evidence offered and received at the trial of the case.

Dated March 30, 1914.

FRANK S. DIETRICH,
District Judge.

No. 552.

Filed March 30, 1914.

A. L. RICHARDSON,
Clerk.



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Dated March 30, 1914.

FRANK S. DIETRICH,
District Judge.

No. 552.

Filed March 30, 1914.

A. L. RICHARDSON,
Clerk.



*E 1/2 SEC 20 & W 1/2 SEC 21
TOWN 44 N RANGE 6 E B M*

No. 552

Defendant's Exhibit No. 3.

Filed Dec. 10, 1917
A. J. Harrison, Clerk.

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DECISION.

*In the District Court of the United States for the District
of Idaho, Northern Division.*

ANDREW WEST,

Plaintiff,

vs.

EDWARD RUTLEDGE TIMBER COMPANY and
NORTHERN PACIFIC RAILWAY COMPANY,

Defendants.

Decision.

July 22, 1913.

A. H. Kenyon, and Merritt, Oswald & Merritt, Attorneys
for Plaintiff.

James B. Kerr, Stiles W. Burr, E. J. Cannon, and Davis,
Kellogg & Severance, Attorneys for Defendants.

DIETRICH, DISTRICT JUDGE:

The plaintiff is seeking to compel the defendants to convey to him the title to the southeast quarter of section 20 in township 44 north of range 3 east of Boise Meridian, timbered land in north Idaho. His theory is that, being a settler upon the tract at the time it was surveyed, qualified to enter the same under the homestead laws of the United States, he was by the Interior Department unlawfully and without fault upon his part denied the right to make entry and procure patent thereto, and that, patent having been issued to the defendant Railway Company through a misapprehension of the law, it took the title in trust for him. The defendant Timber Company is the grantee of the Railway Company. The general rules and conditions under which courts of equity exercise jurisdiction in such cases are well understood, and do not require extended discussion. In the absence of fraud or gross mistake, decisions of the officers of the land department made within the scope of their authority upon questions of fact, or where

questions of law and of fact are inseparably commingled, cannot be reviewed by the courts. But if by manifest mistake of law these officers deprive a man of his right, a court of equity will grant appropriate relief. *Marquez v. Frisbie*, 101 U. S. 473; *Moore v. Robbins*, 96 U. S. 530; *Johnson v. Towsley*, 13 Wall. 72; *Bishop of Nesqually v. Gibbons*, 158, U. S. 156; *Johnson v. Drew*, 171 U. S. 94. Where, as here, the plaintiff is a private individual, he must establish his personal qualifications and his right to receive the title in controversy, for however erroneous the ruling of the land department a private individual cannot be heard to challenge it unless he has been wronged thereby; the Government alone can appear in behalf of the public interest.

The first inquiry, therefore, is whether at the time he offered his filing the plaintiff was qualified to enter public land as a homestead, and whether in due time he substantially complied or tendered compliance with the requirements of the law. The only suggestion of a personal disqualification on the part of the plaintiff is that, not at the time he offered to file upon the land, but subsequently, after he had resided thereon for a considerable period of time, he acquired and held title to more than 160 acres. But it is thought that if a settler is qualified when he takes up his residence and files upon land which is subject to entry, it is immaterial that he thereafter acquires and holds title to more than 160 acres. *Clark v. Mansfield* 24 L. D. 343; *Smith v. Longpre*, 32 L. D. 226; *Mathison v. Colquhoun*, 36 L. D. 82. See also *Ard v. Brandon*, 156 U. S. 537.

As to settlement and improvement, evidence was adduced tending to show that the plaintiff paid a small consideration to a former occupant of the land for his improvements and his prior right of possession, and thereupon took up his residence thereon in May, 1903, and that he has maintained his home there ever since that date; and that he has added to the improvements and cleared and cultivated a small

tract. In due form he applied to make homestead entry on July 17, 1905, shortly after the official survey was approved, but because of the supposed superior rights of the Railway Company his application was rejected. Substantially no evidence was offered by the defendants in rebuttal. While the amount cleared and brought under cultivation from year to year has been pathetically small, I am inclined to the view that, assuming the defendants to be without right, the plaintiff would be entitled to make final proof and receive patent. It has long been the policy of the Government to deal liberally with those who settle in good faith upon the public domain. *Ard v. Brandon*, 156 U. S. 537. In view of the controversy over the title, the refusal of the land department to recognize him as having any right, and the prolonged contest proceedings, it was not to be expected that the plaintiff would apply himself to the reclamation of the land with the courage and energy which would be reasonable under other circumstances. Moreover, the land is covered by a heavy growth of timber, which, because of the present want of transportation facilities, is not marketable, and therefore in clearing under the conditions which have prevailed, it has been necessary to destroy by fire timber products the proceeds of which, with a reasonable market, would, in a large part, if not wholly defray the expenses of reclamation. It is a policy of doubtful wisdom, to say the least, which would require the entryman vigorously to pursue a course attended with such great waste. The defendants urge that, in view of the inaccessability of the land, its elevation above the sea level, the climatic conditions, the outlay required to remove the stumps and brush, and the great value of the timber, it is incredible that plaintiff has ever intended in good faith to make it his home, and that, upon the other hand, it must be inferred or presumed that he seeks title only that he may profit from the value of the timber. While I recognize that the possibilities of fraud in entering such lands under

the homestead laws are great, I am unable to see how place can be given to this argument without indulging the conclusive presumption that ordinarily lands covered with a heavy growth of valuable timber are not enterable under the homestead laws—a view which would seem to be contrary to both the letter of the law and the practicable construction placed thereon by the land department. The evidence abundantly shows that, if cleared, the land is tillable and reasonably productive. The winters are rigorous, but not more so than in many places where it is well known agricultural pursuits are carried on with entire success. So far as appears, transportation facilities will be provided here, as they have been elsewhere, in due course of time. Moreover, in adjudging the good faith of the average entry-man it would be a mistake to assume that he exercises the same conservative judgment that we look for in the capable and experienced man of business. The financial wisdom of the homeless, land-hungry laboring man may be sheer folly to the successful captain of industry, and in rightly discerning the motives of either we must stand with him and feel the forces by which he, and not another, is moved. While it must be admitted that the argument for the defendants is not without cogency, and is highly persuasive, in the absence of conduct upon the part of the plaintiff inconsistent with the theory of and tending to impeach his good faith, I do not feel justified in holding that, merely because there may be grave doubt whether the land, when divested of the timber, should in the exercise of sound business judgment, be regarded as desirable for agricultural purposes, he has acted in bad faith and has had no purpose to till the soil, but seeks the title only in order that he may thereby secure the valuable growth of timber. While the question is not free from doubt, upon the whole I am inclined to the view that, had the claim of the defendants not intervened, the land department would have accepted plaintiff's proof and issued patent.

Now as to the right and title of the defendants. Briefly stated, the claim of the Railway Company is that, while the lands in question were non-mineral, unreserved public lands of the United States, and prior to the inception of any right on the part of the plaintiff, on June 21, 1901, it, as the successor in interest of the Northern Pacific Railroad Company, made selection thereof under the provisions of an act of Congress entitled, "An Act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park," approved March 2, 1899 (30 Stat. L. 993), by filing in the United States Land Office at Coeur d'Alene, Idaho, a proper application and selection list covering this tract, together with others. The description in this list, insofar as it is pertinent here, is as follows: Land which when surveyed will be described as follows: All of Section 20, Township 44, Range 3, in the Coeur d'Alene Land District, in the State of Idaho. Conceding that such a selection list was filed upon the date mentioned, and that at that time the land was unsurveyed, non-mineral public land, the plaintiff contends that such filing was ineffective to withdraw the land from entry, for reasons which we proceed to consider.

The first objection is that, the grant being to the Northern Pacific Railroad Company, and the Railway Company not being named in the granting act, it was not qualified to select the land or to receive a patent therefor. This is one of the questions which it was necessary for the Interior Department to decide and which it did decide. The patent contains an express recital to the effect that upon evidence adduced it was found that the Railway Company was "the lawful successor in interest" of the Railroad Company. In its administration of the public land laws, it is undoubtedly within the jurisdiction of the Interior Department to

pass upon questions of succession, and insofar as such determination involves issues of fact, or issues of mixed law and fact, within the familiar principle, already adverted to it is final and conclusive. But it is said that, contrary to the patent recital, the record shows that there was no evidence upon the point before the Department. Granting that we have before us a transcript of all the proceedings taken in the matter of the plaintiff's application to enter and receive a patent, we cannot assume that we have the entire record in the matter of the Railway Company's application for patent upon its lieu selections, and the presumption must therefore be indulged that the recital is true, in point of fact. It is however, argued that as a matter of law it would be held that the Railway Company could not be an assignee under, or otherwise profit by, the Act, for the grant is to the Railroad Company, and is not assignable. No decision is cited in support of the proposition, nor does plaintiff assign any reason, and apparently none is imaginable, why Congress should have intended to deny the right of assignment, or to confine the operation of the grant to the Railroad Company to the exclusion of its successors in interest. The grant was in no sense a gratuity. The Government contemplated the creation of the Mount Rainier National Park, and to carry out the purpose it was deemed desirable, if not absolutely necessary, to procure title to certain lands embraced in the land grant made to the Railroad Company by the act of July 2, 1864, (13 Stat. 365). For these it was willing to exchange other lands, which it owned, and by the act it proposed to make such exchange. The case is very different from one where the government is promoting a public enterprise by the donation of lands of great value, in which case it may not unreasonably be concerned in the character of the donee, and its qualifications and capacity to carry the enterprise to success. Here, upon the other hand, it was in need of certain privately-owned lands, to carry out its own pur-

poses, and in securing title thereto, surely it was not greatly concerned in the question to whom the consideration should be paid or what was done with it after it was paid. In the light of conditions as they actually existed, and the manifest purpose of Congress to extinguish all private claims to the base lands required for the proposed park, we can do little more than speculate as to the reason why the Railroad Company rather than the Railway Company was named as grantee. It is unreasonable to infer that Congress intended thus to place itself upon record as opposed to the view that the Railway Company had succeeded to the property rights and franchises of the Railroad Company, for but a short time prior thereto, by a proviso in the act of July 1, 1898, (30 Stat. 621; 6 Fed. Stat. Ann. 457), it had expressly disclaimed any purpose to decide or prejudice this question, which was recognized as being of judicial rather than of legislative cognizance. At the present time, the question appears to have been the subject of investigation, and it has been repeatedly held that as a result of foreclosure proceedings consummated prior to the passage of the act of 1899, the Railway Company acquired all the property rights and franchises of the Railroad Company. 21 Ops. Atty. Gen. 486; 25 Ops. Atty. Gen. 401; *Ferguson v. Northern Pacific*, 33 L. D. 634. See also *Northern Pacific Ry. Co. v. United States*, 176 U. S. 706; *Northern Pacific Ry. Co. v. Boyd*, U. S.; 35 Sup. Ct. Rep. 554. It therefore appears that the construction contended for by the plaintiff would render the act nugatory. For if this conclusion is correct, and admittedly it is not open to review upon the record here, it turns out that at the time the act of 1899 was passed, the Railroad Company was not possessed of the lands desired by the Government, but that its rights thereto had passed to the Railway Company, and unless we hold either that by inadvertence the Railroad Company was named while the Railway Company was intended, or that the privilege con-

ferred upon the Railroad Company is assignable, plainly the act becomes wholly ineffectual for any purpose. It is a cardinal principle that of two possible constructions of a statute that one should be adopted which will give to it effect, in preference to that which would defeat the legislative intent. *M. K. & T. Ry. Co. v. Kansas, Pacific Ry. Co.*, 97 U. S. 491, 497. As a general rule of law, restraint upon the right of alienation is not favored, and such grants are assignable. *Webster v. Luther*, 163 U. S. 331. *Beley vs. Naphtaly*, 169 U. S. 353. Accordingly it is held that the Railway Company could, as a matter of law, by assignment become the successor in interest of the Railroad Company to the rights and privileges conferred by the act of 1899, and it having been found as a fact by the Department that it is such successor, the point must be ruled adversely to the plaintiff's contention.

The next objection to the validity of the Railway Company's "selection" is based upon that provision of the act which limits the right of selection to "*non-mineral public lands, so classified as non-mineral at the time of actual Government survey, which has been or shall be made,*" etc. Precisely stated, it is that the land was not expressly classified as non-mineral by the surveyors in the field; it is not claimed that it was returned as mineral, nor is there now any question that it was in fact non-mineral. The determination of the relation which it was contemplated by Congress the surveyor's return touching the mineral character of the land should sustain to the right of selection is not free from difficulties, but doubtless the actual character of the land rather than the report thereof was the dominating consideration. *Northern Pacific Ry. Co. vs. United States*, 176 Fed. 706. Clearly a selection, valid for certain limited purposes at least, may be made of lands not yet classified as non-mineral, for the right of selection extends to unsurveyed lands, which in the very nature of things,

cannot be so classified. The classification called for, being modal, and therefore incidental rather than substantial, and the land in question being non-mineral in fact, it may be seriously questioned whether the plaintiff should, without showing consequent prejudice or injury to himself, be permitted to take advantage of the neglect of the administrative officers to require, in advance of the issuance of patent, a formal report of a fact about the existence of which there is no doubt. But assuming, without deciding, that under such circumstances relief may properly be granted, it must in the first place be held that the record here is insufficient to warrant a finding that the land was not returned as non-mineral; and in the second place, assuming, as contended by the plaintiff, that the return of survey contains no express classification, I am inclined to the view that under the practice prevailing in the land department, the absence of a classification as "mineral" is equivalent to, and is to be understood as, a classification of non-mineral. Undoubtedly the required report from the surveyors in the field was intended for the information of the officers of the land department, to the end that they might act intelligently and promptly in approving or rejecting applications for patents upon lands selected by the grantee. It is quite unimportant, therefore, in what manner or by what system the facts are reported from the field, provided the communication is understood in the land department. If, when a surveyor is sent out, he is instructed to note in his return all lands found to be of a mineral character as "mineral" and to make no notation at all touching lands found to be non-mineral, it cannot be said that a return made strictly in compliance with such instructions, designating some lands as mineral, and containing no notation at all as to others, fails to classify the latter group as non-mineral. The silence of the return in the one case is quite as significant as the express notation in the other. Now while it is not shown that any special instructions to this

effect were given to the surveyors in this case, it does appear that there is a well recognized custom governing the return of surveys, equivalent to such instructions. "It is the uniform custom in surveying public lands to make in the field notes and surveyor's return notation of mines, outcroppings and evidences of valuable mineral deposits where found. When, therefore, the field notes and surveyor's return make no notation whatever of minerals in the land being surveyed, such lands are considered and treated as given a non-mineral classification by the surveyor." *Davenport v. N. P. Ry. Co.*, 32 L. D. 28. See also *Bedal v. St. Paul, etc., Ry Co.*, 29 L. D. 254; *State of Idaho v. N. P. Ry. Co.*, 37 L. D. 135; *St. Paul, M. & M. Ry. Co.*, 34 L. D. 211; *In re N. P. Ry. Co.*, 40 L. D. 64. Accordingly, assuming the facts to be as stated by plaintiff's counsel, I must hold that the land was classified as non-mineral at the time of the survey.

The remaining contention of the plaintiff is that the selection list filed in the local land office by the Railway Company on June 21, 1901, was ineffectual because of an insufficient description of the land. The pertinent provision of the act is "In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company in the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty." It will be remembered that the description employed by the Railway Company was "land which when surveyed will be described as follows," and there follows a correct numbering of the section, township and range. The real question therefore is, whether under any circumstances a description of unsurveyed land by reference to the technical numbers which it will bear when surveyed designates it with "a reasonable degree of certainty." In general practice such a description is not uncommonly used, and were the plaintiff's position not fortified by the opinion of Acting

Secretary Adams in the Hyde case (40 L. D. 284) I would be inclined to the view that it has little support either in reason or the reported decisions, and, with all due respect, I am unable either to follow the reasoning or to concur in the conclusion of that case. It is true, unsurveyed land may never in fact be surveyed, and it is also true that the Government may in the future adopt a system of surveys radically different from that now in vogue. But these considerations are aside from the point. The description before us is universally understood as being equivalent to a statement that if, under the present system of public surveys, the lines thereof were actually extended, it would appear that this land is the southeast quarter of section 20, in township 44 north, range 3 east of Boise Meridian. So far as concerns the certainty of the description, therefore, it is quite unimportant whether the land is ever surveyed or not, or whether the Government retains or abandons its present system of surveys. Assuming that there are in the immediate vicinity other lands to which the public survey has already been extended, a reasonably intelligent surveyor could, with the data furnished by such a description, go into the field and identify the designated tract, and with precision define its boundaries upon the ground. The description is in effect a description by metes and bounds, with a tie to a fixed monument. To find and identify the land the surveyor selected for such purpose would, in compliance with certain familiar rules governing the making of public surveys, start from an established monument in an adjacent survey already officially approved, and, in accordance with such rules, would run certain courses and distances to reach a certain corner of the designated tract, the boundaries of which could thereupon be run out and defined upon the ground. An amplified description tying the land to such monument and giving in detail the courses and distances and the metes and bounds would have no greater precision than the one we are considering. True,

there may be some slight variation in public surveys, but that is a contingency which cannot be wholly obviated; all paper descriptions are in their application subject to a degree of uncertainty; not infrequently doubt arises in the actual location of the lines called for by an official survey. Moreover, when it comes to patent it is necessary to conform the boundaries of the claim to the boundary lines located upon the ground pursuant to such a description as we have here, less difficulty would be encountered than in adjusting those located without reference to the official survey and where the tie is to some natural object arbitrarily chosen. Indeed it is a matter of common knowledge that settlers upon unsurveyed land as a rule endeavor as best they can to conform their boundaries approximately to the projected lines of an adjacent official survey. There is an apparent assumption upon the part of the plaintiff that it was the duty of the Railway Company in some manner to mark the boundaries of its claim upon the ground, but no such duty if imposed by the act, either expressly or by reasonable implication. The requirement is that the "list" "shall describe" the land with "a reasonable degree of certainty." If to give notice of the claim it were necessary to mark the boundaries an entirely different question would be presented. But evidently it was thought by Congress that when an application was filed in the local land office containing a reasonably definite description it would constitute notice to all the world of the pendency of the claim and the status of the land included therein. I am not to be understood as holding that in all cases the description employed by the Railway Company would be reasonably certain; in any given case the degree of certainty of such description depends largely upon the degree of adjacency of surveyed land. Here the official survey had extended to adjacent townships, and I am wholly unable to understand how a list containing a detailed description by metes and bounds would have any more clearly

advised the plaintiff of the exact location of the land than did the list under consideration. But however that may be in this particular instance, it is apparent that unless the view be adopted that, as a matter of law, under no conditions can a description by reference to the lines of the official survey be held to be in compliance with the act, the question of the sufficiency of the description is in every case one of fact, and hence not subject to review by the courts; and I am wholly unable to assent to the proposition that such a description can under no circumstances be held to be reasonably certain.

By the plaintiff much significance is attached to the clause in the latter part of the act, which provides that, "In case such tract (of unsurveyed land) as originally selected and described in the list filed in the local land office shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity." It is urged that such a method as was followed here admits of no variation or discrepancy requiring adjustment. The argument rests wholly upon the assumption that if the method is authorized at all, it is exclusive; but such an assumption is plainly unwarranted. The Act does not purport to require any given form of description, but upon the other hand gives the widest latitude; its only requirement is that in the selection list the lands shall be designated with a "reasonable degree of certainty"; the method of designation is immaterial provided it identifies the land. It was doubtless anticipated that different methods would be employed, and the provision above quoted was intended to point out the course to be pursued in cases where the original description is not tied to the lines of an official survey, as here. In the Act of 1898 (30 Stat. 620, 621) this method of identification had been expressly sanctioned—indeed it had been prescribed to the exclusion of all others—and it is not reason-

able to believe that if, a few months later, Congress had intended to outlaw it altogether, the communication of such intention would have been left to inference or implication. The better view is thought to be that it was intended not to limit the description to any specific form, but to authorize any method which would identify the land with reasonable certainty, leaving to the Land Department the discretion to adopt such rules and regulations as, in the light of experience, might appear to be desirable. It is not doubted that, under the general language of the act, it is competent for the Department, by standing rules, to prescribe such a description as was used by the Railway Company, or a description by metes and bounds, or both. Whether such authority extends to the requirement that the boundaries be marked upon the ground is another question, which need not be decided. But when the Railway Company filed its list there were no rules or regulations upon the subject, and, as was said by Acting Secretary Pierce, in *Hanson v. Northern Pacific Ry. Co.*, (38 L. D. 491), where the sufficiency of this identical list was under consideration, "the practice of allowing selections by the Railway Company as these selections were made had been of such long standing and such uniform practice that it would be unfair, if not illegal, to give retroactive effect to such regulations"; that is, such regulations as were promulgated by circular of November 3, 1909, (38 L. D. 287), requiring a description by metes and bounds, and a posting of notice upon the land, as well as as a reference to the projected lines of the official survey. In adopting such rules and at the same time sustaining prior selection lists not in compliance therewith, the department was not necessarily acting inconsistently. The act does not require a perfect or the best possible description, but only one having a reasonable degree of certainty. It does not follow that one form of designation is wanting in a reasonable degree of certainty because, in the light of experience,

another is adopted which for the time being is thought to be a better. Otherwise the future promulgation of still more stringent regulations would operate to invalidate selections made in strict compliance with the rules now in force. The true view is thought to be that, within the range of sound discretion, the land department is clothed with the authority to determine as a question of fact whether, under the circumstances of the case, any given designation is reasonably certain, and when fairly made within such limits such determination should not be disturbed, even though the courts may be of the opinion that greater precision is both desirable and practicable. My conclusion is that it cannot be held that, as a matter of law, such form of description as was here employed is, under any and all conditions, insufficient to designate the land with a reasonable degree of certainty, and as a question of fact there is no showing warranting a finding that, under the circumstances of this case, the Department either acted fraudulently or abused its discretion in holding the designation to be sufficient.

Much stress is laid upon the familiar rule that public grants are construed strictly against the grantee. In applying this rule, however, some consideration should be given to the fact that the grant here was not a mere gratuity, but that the act is in the nature of an offer upon the part of the Government of an exchange of lands presumably beneficial to it. Besides, the question in controversy relates not to the extent of the grant but only to procedure in the administration of the act, a subject which is left largely to regulation by the land department. As was said by Assistant Secretary Pierce in *State of Idaho v. Northern Pacific Ry. Co.*, (37 L. D. 135, 138): "It was deemed necessary to the accomplishment of its purpose that the United States should own the land placed in reservation by the act (original land grant act). A voluntary conveyance

by the Railway Company was the most feasible method of re-acquiring title to the granted land, and a right of exchange upon the terms and conditions set forth was the consideration offered to induce the company to transfer its title. An offer is made by one party of which acceptance by the other is invited. The act is contractual in character, and terms and conditions not clearly expressed are not to be lightly imposed after acceptance of the offer." But laying aside these considerations, and applying the rule with all possible rigor, how can we construe the act so as to exclude, as a matter of law, descriptions by reference to the official survey? Clearly no such inhibition is expressed, and if implied at all it must be found in the requirement that the land be designated "with a reasonable degree of certainty." But, as we have already seen, within certain limits what is a reasonable degree of certainty in any given case is a question not of law but of fact.

In conclusion it is to be noted that the Railway Company pursued a course which, if not at the time expressly prescribed by, received the latter approval of, and all the time had the apparent sanction of usage in, the land department. The plaintiff was neither misled nor prejudiced thereby, for seemingly he had no knowledge of the existence of the list, and therefore whatever may have been the form of the description, it could not have influenced his action. The claims of a pioneer settler always appeal strongly for sympathy, but upon the most earnest consideration I am unable to grant the relief prayed for and at the same time preserve the integrity of what I understand to be the law.

From what has been said, it necessarily follows that the bill must be dismissed, and such will be the decree; each party to pay his own costs. The attorneys for the defendants may prepare form of decree.

Endorsed: Filed July 22, 1913. A. L. Richardson, Clerk.

DECREE.

*In the District Court of the United States for the District
of Idaho, Northern Division.*

ANDREW WEST,

Complainant,

v.

EDWARD RUTLEDGE TIMBER COMPANY, and
NORTHERN PACIFIC RAILWAY COMPANY,

Defendants.

Decree.

The above entitled cause having come on to be heard, the complainant appearing by his solicitors, A. H. Kenyon and Seabury Merritt, and the defendants appearing by their solicitors Edward J. Cannon, Stiles W. Burr, and James B. Kerr, and having been submitted to the court upon the pleadings therein, and upon proof taken in open court, and said cause having been argued by counsel, and the court being advised, it is, on motion of counsel for the defendants,

ORDERED, ADJUDGED AND DECREED that the bill of complaint of the complainant herein be and it is hereby dismissed for want of equity.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that neither party shall recover costs or disbursements from the other.

By the Court:

Nov. 17, 1913.

FRANK S. DIETRICH,

Judge.

Endorsed: Filed Nov. 17, 1913. A. L. Richardson, Clerk.

*In the District Court of the United States for the District
of Idaho, Northern Division.*

ANDREW WEST,

Complainant,

v.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation;
and the NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Assignments of Error.

Comes now the above named complainant, Andrew West, and in connection with his appeal makes the following assignments of error which he avers were committed by the court in the trial of this cause, and upon which he will rely in the prosecution of his appeal of the above entitled cause in the United States Circuit Court of Appeals, for the Ninth Circuit:

I.

The court erred in holding and deciding that the description contained in the original Selection List No. 61, made and filed by the defendant Northern Pacific Railroad Company, which described the real estate in controversy as follows:

“Land which when surveyed will be described as follows: ALL OF SECTION TWENTY (20), TOWNSHIP FORTY-FOUR (44), RANGE THREE (3), IN THE COEUR D’ALENE LAND DISTRICT IN THE STATE OF IDAHO,”

was sufficient to designate the land intended to be claimed with a reasonable degree of certainty.

II.

The court erred in holding and deciding that the real estate in controversy had been classified as land non-min-

eral in character, as provided in the Act of March 2, 1889, under which the defendant claimed.

III.

The court erred in holding and deciding that the Northern Pacific Railway Company was the successor to or had the right to exercise the rights of the Northern Pacific Railroad Company, which was expressly named in the grant.

IV.

The court erred in holding and deciding that the recital in the patent that the Railway Company was "the lawful successor in interest" of the Railroad Company was binding and conclusive upon the parties.

V.

The court erred in rendering judgment against the complainant.

WHEREFORE, complainant prays that the aforesaid errors be corrected and the judgment of the District Court reversed, and that said court be directed to set aside the judgment heretofore rendered in favor of the defendants and enter judgment in complainant's favor; that the defendants hold the title to said real estate in trust for the complainant, and that his title thereto be quieted, or, if it be deemed that such relief is not grantable, that the cause be remanded for new trial.

A. H. KENYON,

MERRITT, OSWALD & MERRITT,

Attorneys for Complainant, Andrew West.

Endorsed: Filed March 30, 1914. A. L. Richardson, Clerk.

*In the District Court of the United States for the District
of Idaho, Northern Division.*

ANDREW WEST,

Complainant,

v.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation;
and the NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Appeal and Allowance.

The above named complainant, Andrew West, conceiving himself aggrieved by the judgment entered on the 17th day of November, 1913, in the above entitled cause, doth hereby appeal from said judgment to the United States Circuit Court of Appeals, for the Ninth Circuit, and he prays that this, his appeal, may be allowed; that a transcript of the record, proceedings and papers upon which said judgment was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit.

A. H. KENYON,

SEABURY MERRITT,

Attorneys for Complainant and Appellant, Andrew West.
Old National Bank Building,
Spokane, Washington.

And now, to-wit: on the 30th day of March, 1914, IT IS ORDERED, that the appeal be allowed as prayed for and that the amount of bond on said appeal be, and it hereby is, fixed at \$200.00.

FRANK S. DIETRICH,

District Judge.

Endorsed: Filed March 30, 1914. A. L. Richardson, Clerk.

*In the District Court of the United States for the District
of Idaho, Northern Division.*

ANDREW WEST,

Complainant,

v.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation;
and the NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Bond.

KNOW ALL MEN BY THESE PRESENTS, That Andrew West, as principal, and *THE AETNA ACCIDENT AND LIABILITY COMPANY*, of *Hartford, Conn.*, a corporation of the State of Connecticut and licenser to become sole surety on bonds in the State of Idaho, as surety, are held and firmly bound unto the above named defendants in the sum of TWO HUNDRED (200) DOLLARS, to be paid to the above named defendants, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, administrators and assigns, jointly and severally by these presents.

SEALED WITH OUR SEALS and dated this 9th day of February, 1914.

WHEREAS, the above named Andrew West has prosecuted an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the decree rendered by the Judge of the District Court of the United States for the District of Idaho, Northern Division, in the above entitled action.

NOW, THEREFORE, the condition of this obligation is such, that if the above named Andrew West shall prosecute said appeal to effect and answer all damages and costs, if he fail to make said appeal good, then this obligation shall

be void, otherwise the same shall be and remain in full force and virtue.

ANDREW WEST, (Seal)

By A. H. Kenyon, his attorney,
Principal.

(Corporate Seal)

THE AETNA ACCIDENT AND
LIABILITY COMPANY,

By Abe Wyman, Its Resident Vice President,
Therett Towles, Its Resident Assistant Secretary,
Surety.

State of Idaho,
County of Shoshone,—ss.

On this 2nd day of April, in the year Nineteen Hundred Fourteen, before me, a Notary Public, personally appeared Abe Wyman and Therett Towles, known to me to be the Resident Vice President and Resident Assistant Secretary, respectively, of THE AETNA ACCIDENT AND LIABILITY COMPANY, the corporation that executed the foregoing instrument and acknowledged to me that such corporation executed the same; that they know the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company; that they signed their names thereto by like order; that the said company has been duly licensed by the Insurance Commissioner of the State of Idaho, to transact a surety business in the State of Idaho and is authorized by the laws of the State of Idaho to become sole surety upon bonds.

(N. P. Seal)

ADOLPH ROSSI,
Notary Public.

My commission expires Jan. 4, 1915.

Approved April 9, 1914.

DIETRICH, Judge.

Endorsed: Filed April 9, 1914. A. L. Richardson, Clerk.

PRAECIPE.

*In the District Court of the United States for the District
of Idaho, Northern Division.*

ANDREW WEST,

Complainant,

v.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and EDWARD RUTLEDGE TIMBER COMPANY, a Corporation,

Defendants.

Praecipe.

An appeal having been prosecuted by the complainant above named from the final decree entered herein, dismissing the bill of complaint of the complainant.

IT IS NOW STIPULATED by and between the parties hereto, by their respective solicitors, that the following papers shall, together with the petition for appeal, order allowing appeal, bond on appeal, citation on appeal, be incorporated into and constitute the record on such appeal:

1. Copy of Bill of Complaint.
2. Copy of Answer of defendant; Northern Pacific Ry. Co.
3. Copy of Answer of defendant, Edward Rutledge Timber company.
4. Copies of the replications of the complainant to the answers of the defendants.
5. The abstract of the evidence approved by the trial court.
6. A copy of the original plat, marked Defendants' Exhibit 3, introduced in evidence in connection with the testimony of the witness, Lloyd Gilham.
7. A copy of the final decree.
8. A copy of the opinion of the trial court.

It is further stipulated that such transcript, including the foregoing papers, may be approved by the Judge of said court for the purposes of the appeal herein.

A. H. KENYON,
SEABURY MERRITT,
Solicitors for Complainant.
E. J. CANNON,
C. W. BUNN,
JAMES B. KERR,

Solicitors for Defendant Northern Pacific Railway Co.

STILES W. BURR,
JAMES B. KERR,

Solicitors for Defendant Edward Rutledge Timber Company.

Endorsed: Filed March 30, 1914. A. L. Richardson, Clerk.

*In the District Court of the United States for the District
of Idaho, Northern Division.*

ANDREW WEST,

Plaintiff,

v.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation; and the NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendants.

Citation.

United States of America,—ss.

The President of the United States to Edward Rutledge Timber Company, a corporation and the Northern Pacific Railway Company, a corporation, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, State of California, within thirty days from the date of this citation, pursuant to an appeal filed in the Clerk's office of the United

States District Court for the District of Idaho, at Boise, Idaho, wherein Andrew West is appellant and you are respondent, to show cause, if any there be, why the decree rendered against said Andrew West, appellant as in the said order allowing the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Frank S. Dietrich, United States District Judge for the District of Idaho, this 9th day of April, 1914.

FRANK S. DIETRICH,

United States District Judge for the District of Idaho.

Attest:

A. L. RICHARDSON,

Clerk of the District Court of the United States for the District of Idaho.

Service of the foregoing citation admitted and receipt of copy acknowledged this 16th day of April, 1914.

STILES W. BURR and

JAMES B. KERR,

Solicitors for Respondent

Edward Rutledge Timber Company.

C. W. BUNN,

E. J. CANNON and

JAMES B. KERR,

Solicitors for Respondent

Northern Pacific Railway Company.

Endorsed: Filed on return April 22d, 1914. A. L. Richardson, Clerk.

Return to Record.

And thereupon it is ordered by the court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to

the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Attest:

(Seal)

A. L. RICHARDSON,
Clerk.

Clerk's Certificate.

*In the District Court of the United States for the District
of Idaho, Northern Division.*

ANDREW WEST,

Appellant,

v.

THE EDWARD RUTLEDGE TIMBER COMPANY, a Corporation, and NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Respondents.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages, numbered from 1 to 96, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in accordance with Praeceptum for Transcript, on file in said cause.

Witness my hand and the seal of said court affixed at Boise, Idaho, this 30th day of April, 1914.

(Seal)

A. L. RICHARDSON,
Clerk.

9

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

Upon Appeal from the United States District Court
for the District of Idaho, Northern Division

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COM-
PANY, a corporation, and NORTH-
ERN PACIFIC RAILWAY COM-
PANY, a corporation,

Respondents.

NO. 2416

OPENING BRIEF OF APPELLANT

A. H. KENYON, Spokane, Wash.,
SEABURY MERRITT, Spokane, Wash.,
Attorneys for Appellant.

JAMES B. KERR, Portland, Ore.,
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Attorneys for Respondent,
Edward Rutledge Timber Company.

E. J. CANNON, Spokane, Wash.,
Attorney for Respondent,
Northern Pacific Railway Company.

Filed

MAY 30 1914

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
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Upon Appeal from the United States District Court
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ANDREW WEST,

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EDWARD RUTLEDGE TIMBER COM-
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Respondents.

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Attorneys for Appellant.

JAMES B. KERR, Portland, Ore.,
STILES W. BURR, Minneapolis, Minn.,
Attorneys for Respondent,
Edward Rutledge Timber Company.

E. J. CANNON, Spokane, Wash.,
Attorney for Respondent,
Northern Pacific Railway Company.

STATEMENT

Appellant brought this action on the equity side of the Court, seeking to have the respondent, the Edward Rutledge Timber Company, declared a trustee of the legal title to a certain quarter section of land in what is known as the Marble Creek Country, in Shoshone County, State of Idaho, and more particularly described in the pleadings.

The facts as admitted on the trial and proven are that on March 2, 1899, Congress passed an Act granting to the Northern Pacific Railroad Company the right to relinquish all of its lands in what is known as the Mount Rainier National Park, and to select in lieu thereof other lands in the manner set forth in the Act, which will be hereafter quoted.

On June 21, 1901, the Northern Pacific Railway Company filed in the General Land Office at Washington, D. C., its lieu selection list No. 61, which contained the following description, namely: "Lands, which when surveyed, will be all of Section 20, Township 44, North Range 3, E. B. M." (The lands in controversy being the Southeast Quarter of said section), which said selection list No. 61 purported to select these lands pursuant to the Act of March 2, 1899, in lieu of certain lands relinquished by the Railroad Company in the said Mount Rainier National Park. No record was made of this in the Local Land Office, nor was any information available in said office that said lieu list No. 61 had

been filed with the Commissioner of the General Land Office.

On May 15th, 1903, Appellant, Andrew West, first visited the lands in controversy which were then unsurveyed. He found them occupied by one John Hanson, who had constructed a cabin upon the lands, cleared one-half acre of land, and had blazed the lines around his claim, and had posted a notice on each corner thereof and one on the door of his cabin, which notice was to the effect that John Hanson had settled upon the lands, claimed them as his home, and intended to enter the same under the homestead laws as soon as the said lands should be surveyed and thrown open to entry. Said John Hanson was at that time, however, in very poor health, and it was necessary for him to go away to procure medical treatment, and appellant West thereupon purchased from John Hanson his right of possession and the improvements upon the said land. Appellant immediately went into possession, and thereafter continuously resided upon and remained in possession of said lands, improved and cultivated the same, in a substantial way, to the present time, and he is now in possession thereof.

At the time of the settlement by Appellant West, the South line of Township 45, Range 3, E. B. M., which is the North line of Township 44, Range 3, E. B. M., had already been surveyed, having been surveyed April 22nd, to April 24th, 1901.

Township 44, Range 3, E. B. M., including the lands in suit was surveyed, and the official plat of survey was filed in the Local Land Office on July 17th, 1905, and the lands

were then first open for entry under the homestead laws of the United States.

Immediately thereafter, and on the same day, Appellant West made application to enter the lands in question under the homestead laws of the United States, which application was rejected because of its supposed conflict with lieu selection list No. 61 filed by the Respondent Railway Company on June 21, 1901. From the order rejecting this application, appellant West appealed to the Commissioner of the General Land Office. The Commissioner affirmed the order rejecting his application, and appellant West appealed to the Honorable Secretary of the Interior, who sustained the Commissioner.

On July 31st, 1905, the Railway Company filed its second lieu selection list No. 61, in which list the lands in controversy were described as follows: "The Southeast Quarter of Section 20, Township 44, North Range 3, E. B. M." Thereafter, on October 10th, 1910, patent to said lands was issued to the respondent, Railway Company.

Respondent Railway Company conveyed the lands in controversy to the respondent Timber Company on the 11th day of February, 1911.

For the sake of brevity we will refer only to the facts which are necessarily involved in the questions to be presented on this appeal.

The learned trial Court found all of the facts in favor of the Appellant, but concluded that the description used

by the Northern Pacific Railway Company in its first lieu selection list No. 61, described the lands "in such manner as to designate the same with a reasonable degree of certainty," * * * That the Northern Pacific Railway Company was the lawful successor in interest of the Northern Pacific Railroad Company, and was entitled to select the lands under the terms of the Act of March 2, 1899; that the lands in question were at the date of the filing of the first selection list No. 61, "non-mineral public lands, so classified as non-mineral at the time of actual Government survey, which has been or shall be made," etc., and that the recitation in the patent of the United States issued to the Railway Company, that the said Railway Company was "the lawful successor in interest of the Railroad Company" was binding and conclusive upon the parties to this cause, and dismissed the bill as without equity. Further facts pertaining to the points raised on this appeal will be presented in the argument.

The Court found all of the issues in favor of the Appellant with the exception of the points upon which we have assigned error, and these matters we will treat in the order of their assignment.

ARGUMENT

THE DESCRIPTION CONTAINED IN THE ORIGINAL SELECTION LIST WAS NOT SUFFICIENT TO DESCRIBE ANY PARTICULAR LAND OR IMPART ANY NOTICE.

The provisions of the Act of March 2, 1899, which define

the rights and prescribe the duties of the Northern Pacific Railroad Company in making lieu selections under said Act, are found in Section 4 of the same, which is as follows:

“Sec. 4. That upon the filing by the said railroad company at the local land office of the land district in which any tract of land selected, and the payment of the fees prescribed by law in analogous case, and the approval of the Secretary of the Interior he shall cause to be executed, in due form of law, and deliver to said company, a patent of the United States conveying to it the lands so selected. In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the Company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed by said local land office, a new selection list shall be filed by said company describing such tract according to such survey; and in case such tract, as originally selected and described in the list filed in the local land office, shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity.”

Vol. 30, U. S. Statute at Large, p. 994.

A proper construction of this act as applied to the parties to this controversy requires us to take into consideration the circumstances surrounding the parties at the time of the initiation of their respective claims, the condition of the lands sought to be claimed and the statutes under which each were claiming.

Subsequent to the passage of the Act of March 2, 1899, and on June 6, 1900, Congress passed another Act defining the rights of the settler upon the unsurveyed public domain of the United States, the portion with which we are here concerned being a part of Section 3, which reads as follows:

Sec. 3. That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws.

Vol. 2 U. S. Compiled Statutes, p. 1393.

Under this section the appellant West had a right to go upon any portion of the unappropriated and unsurveyed public domain, establish his residence thereon, and acquire a prior right to enter the same under the homestead laws of the United States when the said lands should be surveyed and opened to entry by the Government.

In order that a selection by the Railroad Company made subsequent to June 6, 1900, should be such as to withdraw the lands so selected from settlement under the Act of June 6, 1900, the selection must be such as to segregate the lands so selected from the public domain, and give notice to any intending settler of the selection and segregation.

The Act of June 6, 1900, does not require the settler to first determine what the description of the land settled upon by him will be after survey by the Government. It requires no argument to establish the fact that in the very nature of things such a requirement could never be complied with by the settler in a timbered country such as the lands in controversy, and the only segregation which could be reasonably made of such lands so as to give notice to an intending settler, would in the very nature of things, require some notice to be placed upon or adjacent to the lands so attempted to be selected, or by filing in the Local Land Office a selection list containing such a description as would enable an intending settler to definitely locate the lands so sought to be selected with the aid of the description solely. Until such segregation is made, so far as the rights of intending settlers under the act of June 6, 1900, are concerned, the lands are a part of the public domain, which they are lawfully entitled to enter and settle upon. This is now the rule of construction and interpretation adopted by the Honorable Secretary of the Interior and Commissioner of the General Land Office in construing this very Act, that is, the Act of March 2, 1899.

Carrie E. Shearer vs. Northern Pacific Railway Company, and Edward Rutledge Timber Company, Intervenor. Decision of the Commissioner of the General Land Office, dated March 5, 1913.

This rule of construction and interpretation has also been followed by the Honorable Secretary of the Interior and

applied to lieu selections under the act of June 4, 1897, which act does not by its terms prescribe any description whatever for the lands attempted to be selected. That portion of the Act of June 4, 1897, so construed is as follows:

“That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: Provided further, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.”

Considering an application to select unsurveyed lands in lieu of lands surrendered in a forest reserve under the above act, the Honorable Commissioner says:

“The act of 1897, *supra*, did not supersede said act of May 14, 1880. It did not provide for the withdrawal of such lands from settlement. This could only have been effected under proffers of the character here involved, by marking the land selected upon the ground, or by reference to such natural boundaries or monuments as would have been notice in fact or in law to intending settlers. A reference to lands as what will be, when surveyed, a technical subdivision of a specified section, gives no such notice either in law or in fact. So it results that until the approval of the sur-

vey such settlers had no notice and no means of acquiring information which would have enabled them to avoid conflicts with these selections. It follows that any proof of non-occupancy was valueless. No person could have known in fact that what would be a particular subdivision of the public land when surveyed, was then unoccupied, and the fact that certain portions of this same township had theretofore been surveyed does not, for manifold reasons, weaken this plain conclusion. Upon this question it has not been thought necessary to verify objection of counsel that there were at the time of these selections other proofs of non-occupancy, consisting in part of an affidavit (not now in the record) other than that made by the said Henry W. Bowen, which was on file in still another of the Hyde selections; nor to give any weight to the record fact called specially to the attention of the Department since the oral hearing that the selections themselves show that the complete survey of this township had theretofore been made in the field.

As to the missing affidavit, assuming that it was properly in the record and that it purported all that is claimed for it, still in the view now taken of this case this affidavit proved nothing. The same is true of the recital in the selection itself. It was a coincidence only that the lines of the survey upon the ground and the description given by the selector of these technical subdivisions, were the same which received official recognition by the approval of the township plat. Such was not a necessary result. True, this coincidence was anticipated, but in law the case is the same, as if that field survey had been rejected in its entirety and a new survey made upon other lines.

This being true, it was not possible in law for the Commissioner of the General Land Office to say that sufficient, or any, proof of this question had been presented, or that the selector would upon survey be en-

titled to a patent. That officer erred in so ruling. There was a total absence of jurisdictional facts upon which to base such ruling and the selector took nothing thereby and his assignee is chargeable in law with this lack of jurisdiction and occupies no better position.

The Department has not overlooked the fact and is not disposed to evade the argument that in this view such a selector of unsurveyed land would have no reasonable assurance that he would in any case be able to complete title thereto. But the answer is plain. A person owning land within the limits of a public forest reservation was not bound to relinquish it to the Government. He might still own, hold and enjoy it. He was not bound to accept the invitation extended by that act to make such relinquishment, but when he did so he was bound, not only by the terms of the act but by the limitations upon its benefits imposed by other laws. He might have selected surveyed public lands of the United States, vacant and open to settlement, and upon proof of their non-mineral character and non-occupancy concurrent in time with the selection, he might have completed title thereto without delay; but if he selects unsurveyed lands it is a matter of his own choice and made at his own risk. It may be that the risk might have been reduced to the minimum by such description in making the selections as would have identified the lands as a then present fact, but where such identification was not made the selector necessarily takes the risk of their being or becoming occupied adverse to his selection before the approval of the township plat of survey, which, no matter what may be the application of the doctrine of relation in such cases, is the first identification of such land. Such identification previous to that time was not possible, either by the unofficial protraction of the lines of subsisting public surveys, or by a private survey of any

character. The United States are sovereign and the sovereign makes his own surveys. See *United States v. Montana Lumber & Manufacturing Co.* (196 U. S. 573), and cases therein cited.

The mere fact that the act provides for the selection of vacant land open to settlement is conclusive upon this proposition. If it were not open to settlement, it was not subject to selection; but being subject to selection it was still, unless identified in fact, open to settlement under the act of May 14, 1880, *supra*, and might be under the provisions of that act appropriated adversely to the selector at any time before the approval of the township plat of survey. Such approval was an identification of the land as of that date, and by relation as against the Government as of the date of the proffers of exchange, but it did not and could not so attach as to cut out intervening adverse settlement claims. This thought receives additional support in the proviso of the act relating to cases of unperfected claims upon the lands relinquished and requiring the laws respecting settlement, residence and improvement, etc., to be complied with on the new claims, credit being allowed for the time spent on the relinquished ones. In cases of this sort the selector could without fear of jeopardizing his selection make it of unsurveyed land, because he would be required to settle, reside upon and improve such unsurveyed land and this residence, settlement and improvement would be notice to the world of his claim which would fully protect him until the filing of the township plat of survey, when he would be permitted to make entry thereof and complete title under the further terms of said act."

F. A. Hyde, et al., Vol. 40 Land Decisions, 284.

Decision of the Commissioner, dated October 6, 1911.

The fact is that both the Commissioner of the General Land Office and the Department of the Interior have, without exception, followed the construction contended for by appellant as to the Act of March 2, 1899, and other kindred acts, in all matters pertaining to lieu selections, with the single exception of the decision in Appellant's case. It is not possible for us to establish this by citing authorities, but if there is a single decision in conflict with our statement here made it will be easy enough for the respondent to produce that decision.

If the intent of the law making body can be ascertained it will be taken into consideration in determining the construction of the statute under consideration, and we believe that it conclusively appears from the language of the Act of March 2, 1899, that Congress intended to require such a description in all lieu selections under this Act as would effectually segregate the lands sought to be selected from the public domain. We believe this because the Act of May 14th, 1880 (21 Statute at Large, p. 140), and commonly known as the Squatters Act, had long been in effect at the time of the passage of this act. Under this Act any person qualified to enter land under the homestead laws of the United States might obtain a preference right of entry by settling upon the unsurveyed public domain.

Now Congress had a short time prior to the enactment of the statute in question, and on July 1, 1898, granted to the Northern Pacific Railroad Company the right to select other lands in lieu of those lost within the place limits by

reason of the same being claimed by settlers, and provided that such lieu selections might be made on unsurveyed lands, in which Act they used the following language: "But all selections of unsurveyed lands shall be of odd numbered sections, to be identified by the survey when made," etc.

Vol. 6 Fed. St. Ann., p. 456.

If Congress had intended to continue to grant to the Railroad Company the right to make lieu selections by simply filing lieu selection lists, describing the lands according to what they might be when surveyed, it is clear they would have continued the use of the language found in the Act of July 1, 1898, above quoted. The fact that Congress has expressly discarded the phraseology employed in the Act of July 1, 1898, and employed language which was so plainly in conflict with the regulations of the Department promulgated under the Act of July 1, 1898, clearly manifests that they could have had no other object or purpose in view than that of annulling the practice theretofore established of permitting the Railroad Company to make lieu selections by describing the lands according to what it would be when the survey was made. In other words, subsequent to July 1, 1898, and prior to or at the time of the passage of the Act of March 2, 1899, Congress must have been informed of the conflicts arising between the settlers and the Railroad Company by reason of the practice of the Railroad Company under the Act of July 1, 1898, and have used the language found in the Act of March 2, 1899, for the express purpose of avoiding any further conflict between the settler and the Railroad Company.

We think the Act of March 2nd, 1899, contemplated this very thing, else, why should the Act provide for two descriptions? One describing the lands "in such manner as to designate the same with a reasonable degree of certainty," etc., before survey, and the other, "A new selection list describing such lands according to such survey," after survey, and the further provision in the last three lines of Section 4 of said Act providing for the changing of the lines of any selection, made before survey, to conform to the official survey.

We are unable to comprehend or understand how any construction can be placed upon the last part of Section 4 of the Act of March 2, 1899, which would not be in direct conflict with the theory that selections might be made under this Act by describing the lands according to what they would be when surveyed. That portion of the Section referred to reads as follows:

"And within the period of three months after the lands including such tract shall have been surveyed, and the plats thereof filed by said Local Land Office, a new selection list shall be filed by said Company, describing such tract according to such survey, and in case such tract as originally selected and described in the list filed in the Local Land Office, shall not precisely conform with the lines of the official survey, the said Company shall be permitted to describe such tract anew, so as to secure such conformity."

If the description contained in the original selection list was sufficient to describe any land at all it described the identical land contained in the description of the second

selection list. If the theory of the trial Court and the contention of counsel is correct there could be no necessity for filing the second list.

If the officials of the Railway Company should conclude that there might be lands which would be described in a certain way under some future survey which might be made, and which lands might be valuable for their timber products, and that, without ever seeing or going upon the land or doing anything whatsoever which might impart notice to the settler that it desired any particular land, and should cause a general blanket selection list to be filed in the Land Department at Washington in which they might describe all land that might ever thereafter be surveyed, even then there could never be a necessity for filing a second selection list covering the same land.

The learned trial Court in passing upon this question said:

“By the plaintiff much significance is attached to the clause in the latter part of the act, which provides that, ‘In case such tract (of unsurveyed land) as originally selected and described in the list filed in the local land office shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity.’ It is urged that such a method as was followed here admits of no variation or discrepancy requiring adjustment. The argument rests wholly upon the assumption that if the method is authorized at all, it is exclusive; but such an assumption is plainly unwarranted. The Act does not purport to require any given form of description, but upon the other

hand gives the widest latitude; its only requirement is that in the selection list the lands shall be designated with 'reasonable degree of certainty'; the method of designation is immaterial provided it identifies the land. It was doubtless anticipated that different methods would be employed, and the provision above quoted was intended to point out the course to be pursued in cases where the original description is not tied to the lines of an official survey, as here."

It seems to us that the trial Court has here overlooked the most important thing to be considered concerning this question; that is, it was the intention of Congress to exclude this particular method because it had theretofore been tried and found unsuccessful.

It seems to us that the conclusion is inevitable, even under the ordinary rule of construction, and when we take into consideration the rule which requires that public grants shall be strictly construed against the grantee and in favor of the grantor, and that nothing passes but what is conveyed in clear and explicit language, there ought to be no doubt as to how the statute in question should be construed. Again the learned trial Court recognized this rule but evaded it, saying:

"Much stress is laid upon the familiar rule that public grants are construed strictly against the grantee. In applying this rule, however, some consideration should be given to the fact that the grant here was not a mere gratuity, but that the act is in the nature of an offer upon the part of the Government of an exchange of lands presumably beneficial to it. Besides, the question in controversy relates not to the extent of the grant, but only to procedure in the

administration of the act, a subject which is left largely to regulation by the land department."

The fact still remains, however, that the Act of March 2, 1899, is a grant in fact, granting to the Railroad Company the right, at its option, to surrender its right to a worthless mountain range and accept in lieu the right to select from among the surveyed or unsurveyed public lands of the United States the choicest and richest part thereof. The Honorable Commissioner of the General Land Office has so construed this very Act.

Northern Pacific Railway Company, 40 L. D., p. 441.

In discussing the rule of construction above mentioned the United States Supreme Court says:

"The reason of the above rule is obvious—parties seeking grants for private purposes usually draw the bills making them. If they do not make the language sufficiently explicit and clear to pass everything that is intended to be passed, it is their own fault; while, on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking, by ingenious interpretations and insinuation, that which cannot be obtained by plain and express terms."

Dubuque & Pacific R. R. Co. vs. Litchfield, 64 U. S. 16, L. Ed. 509.

Charles River Bridge vs. Warren Bridge, 11 Pet. 420.

Barden vs. N. P. B., 38 L. Ed. 992-991, 154 U. S. 312.

Cornell vs. Coyne, 192 U. S. 432, B. 48 L. Ed. 509.

“But if there be any doubt as to the proper construction of this statute—and we think there is none—then that construction must be adopted which is most advantageous to the interests of the government.”

Hannibal & St. Joseph R. Co. vs. Missouri River Packet Co., 125 U. S. 260; 8 Sup. Ct. 874; 31 L. Ed. 731.

Story vs. Wolverton, et al, 78 Pac. 590.

We cannot help but believe that the hand of the Railroad Company is seen in the drafting of this bill, for the reason that while the Railroad Company is given the right to select from the surveyed and unsurveyed public lands of the United States, the settler upon the lands sought to be set aside as the Mount Rainier National Park is granted in lieu of his rights the right to select only surveyed lands. The Act in question to this very material extent prefers the Railroad Company over the settler. Under these conditions and circumstances we do not believe that the aid and encouragement of the Courts ought to be given in further extending these rights of preference by construction of the Act in question, in favor of the grantee who has thus sought and obtained an advantage over the settler who surrenders equal rights with such grantee. We refer to section 3 of the Act of March 2, 1899, which reads as follows:

“Sec. 3. That upon execution and filing with the

Secretary of the Interior, by the Northern Pacific Railroad Company, of proper deed releasing and conveying to the United States the lands in the reservation hereby created, also the lands in the Pacific Forest Reserve which have been heretofore granted by the United States to said Company, whether surveyed or unsurveyed, and which lie opposite said company's constructed road, said company is hereby authorized to select an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual Government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any State into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States: Provided, that any settlers on lands in said National Park may relinquish their rights thereto and take other public lands in lieu thereof, to the same extent and under the same limitations and conditions as are provided by law for forest reserves and national parks."

Vol. 30 U. S. St. L., p. 994.

The lands in controversy were originally owned by the Government. In making disposition thereof Congress, acting for the Government, was providing the manner of disposing of said lands in a governmental capacity. Many conflicts had arisen between the settlers and the railroads as to who had the first rights under selections and settlements. The courts had been and were called upon to determine these conflicts.

On July 1, 1898, Congress passed a lieu selection act. In

that act it was provided that lieu selections might be made of any unsurveyed lands "to be identified by the survey when made." This act was for the protection of the railroad company by reason of the loss of large areas of its land which had been given it under its grant, by reason of portions thereof having been entered and settled upon by settlers under the laws of the United States.

In less than two years and on March 2, 1899, the act involved at bar was passed. In that act it was provided that if selections were made of unsurveyed land that the selection list should be filed "at the local land office," and not in the General Land Office at Washington; it further provided that the lands sought to be selected should be described "in such manner as to designate the same with a reasonable degree of certainty."

It cannot be said that Congress made such radical changes and provisions in the later act from those contained in the former without any thought or purpose. All of the provisions which were changed were for the benefit of the settler. If the provisions of the later act were complied with no settler could complain. If the selection list was filed in the local land office the settler would have an opportunity to know of its existence, examine it and determine, if it was possible so to do from its contents, what land was sought to be selected. At bar the evidence shows that investigation and inquiry was made at the local land office and that nothing could be found of record imparting any notice as to these selection lists.

What is the clear meaning of the provision that the land

shall be described “in such manner as to designate the same with a reasonable degree of certainty”? In the case at bar it is shown that the closest surveyed line to this land is the south line of the township adjoining on the north. Sections one to eighteen, inclusive, constitute the first three miles on the north line of said township. The southeast quarter ($SE\frac{1}{4}$) of Section Twenty (20), in controversy here, is three miles and a half from that surveyed line. It is in rough, mountainous, heavily timbered country. A man who had sufficient means with which to employ surveyors to run out the lines and determine what this tract of land would be when surveyed is not the man that would ever become the settler. In fact it is and would have been a physical impossibility for any person, other than the U. S. Government, to have ascertained what this particular tract of land would be when surveyed.

If the railway company had been doing as the settler, going into the heart of the country which was unsurveyed, making examinations and determining what, if any land, it desired to take, it could have, by reference to Marble Creek or some mountain peak or some other object or monument, natural or artificial, designated such land with a reasonable degree of certainty. Lines could have been blazed, corners could have been marked and it could have acted in the same manner that the settler is required to and does act. It was not and is not entitled to any more consideration at the hands of the Court than is the pioneer who takes his blankets and provisions on his back and goes into the heart of the unsettled country for the purpose of establishing and providing for himself a home. A settler does

not attempt to obtain or procure any rights except those that he takes possession of and occupies and which he plainly marks so that any subsequent claimant may be able to ascertain that the land is occupied. This condition is the very condition Congress was meeting. It did not desire to continue the law and the rule which provided for the identification of lands after they were surveyed. It was the intention of Congress that the land should be so described that it would be reasonably designated in fact.

The contemporaneous history of this legislation as manifested by the plain provisions of the acts, is amply sufficient to show the clear intention of Congress to provide a means by which a designation of the lands as a matter of fact would protect the settler so that he would not go on unoccupied lands and devote a number of the best years of his life in establishing a home and to then have it taken away from him.

It was well known to Congress that the land could not be described so as to designate it by legal subdivisions of sections, townships and ranges. It was also well known that such designation could only be made by tying or reference to natural or artificial monuments and objects, or by blazing and marking. With that knowledge in its possession it was provided in the act that the land should be designated with a reasonable degree of certainty and the only possible way that could be done was by the reference or tying to the natural or artificial monuments and objects and by blazing and markings. To the end and for the purpose of doing that which would not be unfair to the railroad

company it was provided in the act that if its lines based upon the references and tying to such natural or artificial objects and monuments or to such blazings and markings, do not conform to the lines which may at some subsequent time be fixed by the United States Government survey, the description may be corrected by the filing of a new list so as to make such lines conform to the survey.

Again, unless the language of the Act is such as to clearly prohibit it, the Act involved in the case at bar should be so construed as to give equal rights and opportunities to both the prospective settler and the Railway Company in the matter of acquiring the unsurveyed lands of the United States. The construction placed upon this Act by the trial Court gives to the Company much greater rights and privileges than is left to the settler.

Commencing at a time long prior to the passage of the Act of March 2, 1899, and extending down to the present time, the settler upon the unsurveyed public land has been required by the Land Department to segregate any land attempted to be claimed by him by marking the boundaries thereof upon the ground in such a manner that there could be no mistake as to the identity of the lands claimed by him. The Act of March 2, 1899, is not only susceptible of such a construction, but we think clearly requires it. In any event, we submit that it is the duty of the Court to so construe this Act that equal rights will be granted to all, and special privileges to none. To do otherwise is to say to Congress that in the passage of the Act of March 2, 1899, they intended to grant special privileges to the Railroad

Company over the settler. We would like to believe that no such intention ever existed, not for the sake of the result in this case, but for the sake of posterity.

The official records of the United States, of which the court must take judicial knowledge, furnish another cogent and irresistible reason why the description contained in the original selection list was insufficient. A number of sections and parts of sections are described, giving the number of acres, which aggregated 3920 acres, according to the selection list. All of the numbers of acres set forth in said selection list are based upon the theory that each section contains 640 acres. It is well known that the north, west and south tier of sections never contain the exact acreage contained in the interior sections. (Tr., p. 51).

From the official survey of the lands described in the selection list which was attempted to be selected, it appears that the west half of section 6 contained 282.03 acres instead of the 320 acres as shown in the list. That the northeast quarter of the southwest quarter and the south half of the southwest quarter of section 30 contained 115.13 acres as against 120 shown in the list. Necessarily the west half of section 6 being so much different when actually surveyed from the amount shown in the list the west half of sections 7, 18, 19, 30 and 31 would show practically the same discrepancy.

The act provides that equal quantities of land must be released and accepted. The very facts contained in this survey show, beyond peradventure of a doubt, that it

was and is a physical impossibility to come within the provisions of this act by attempting to describe the lands as to what they will be when surveyed.

Directing attention again to a part of the public records of the United States, of which the court must take judicial knowledge, we find that all of the land in sections 1 to 24 of township 12, South Range 4, East W. M., according to the official survey of December 22, 1913, was first surveyed in 1905 and 1906; that that survey was not investigated until January, 1911, at which time the survey was rejected. In June, 1911, a new survey was ordered which was actually made on the ground in 1912. On October 29, 1913, the plat of the second survey was filed in the land office and was approved on December 22, 1913. There were variances between the lines of the first and second surveys of from 40 to 60 rods. There were variances in the quantity of land contained in some quarter sections of almost a hundred acres, in some instances more and in some less than appeared in the first survey.

The variance of 40 rods across a section is 80 acres. Could it have been possible for any surveyors or engineers, however competent, to have gone upon these lands, discovered and marked out the boundaries thereof under the description contained in the selection list filed by the railway company, wherein the lands were referred to as to what they would be when surveyed. The official surveyors of the United States Government were unable so to do until, acting under direction of the land department, they had made a second survey.

In discussing this question the learned trial court made use of language which appears to us to show that he failed to consider this part of the case in its true light. We refer to the following, after stating that he believed the description used by the Railway Company in its selection list was sufficient, "but however that may be in this particular instance, it is apparent that unless the view be adopted, that, as a matter of law, under no conditions can a description by reference to the lines of the official survey be held to be in compliance with the Act, the question of the sufficiency of the description is in every case one of fact, and hence not subject to review by the courts, and I am wholly unable to assent to the proposition that such a description can under no circumstances be held to be reasonably certain."

In the case at bar there was no room for any disputed question of fact. The respondent Railway Company filed its purported lieu selection list No. 61, purporting to cover the lands in question. Appellant West made application to enter the lands in question under the homestead laws of the United States. His application was rejected, "because in conflict with lieu selection list No. 61 theretofore filed by the Northern Pacific Railway Company." West appealed, contending that the selection by the Railway Company was void because they had failed to comply with the law. No testimony was ever taken, no evidence was ever introduced, nor in the nature of things could there have been any evidence considered; no hearing was ever ordered, and under the circumstances it would have been improper

for the officers of the Land Department to consider any evidence.

The courts have universally held that where the facts are all admitted or undisputed, that what is "reasonable" within the meaning of any given statute is a question of law for the courts.

"Whether the regulation of a Railroad Company, separating white and colored people and providing separate cars for each race was a reasonable one or not the facts being admitted, is a question of law for the Court."

Chilton vs. St. L. & Iron Mt. R. Co., 19 L. R. A. 269.

"The construction of a written contract where no extrinsic evidence is necessary to explain its terms and also of an oral contract where its terms are admitted is a question of law for the Court."

9 Cyc. 591.

Dennis vs. Natl. Bank, 38 Wash. 439, 80 Pac. 764.

"What is a reasonable time to object to items of an account rendered, the dates being clear, is a question of law."

Fleischner vs. Kubli, 25 Pac. 1089.

Standard Oil Co. vs. Van Etten, 107 U. S. 333-334. 27 Law. Ed. 322.

"A police regulation must not extend beyond that

reasonable interference which tends to preserve and promote enjoyment generally of those inalienable rights with which all men are endowed, etc. * * * and that whether an act purporting to be within the field of police power is reasonable or not, in the ultimate is a judicial question."

Bonnett vs. Vallier, 116 N. W. 885, 17 L. R. A. N. S. 486-491.

State vs. Redmon, 114 N. W. 137; 14 L. R. A. N. S. 229.

This being true there is no doubt concerning the rights of the Court to review the action of the officers of the Land Department in this case.

This being true there is no doubt concerning the rights of the Court to review the action of the officers of the Land Department in this case.

"Where there is a mixed question of law and of fact, and the Court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive. But if it can be made entirely plain to a court of equity that, on facts about which there is no dispute or reasonable doubt, the officers of the Land Department have, by a mistake of law, deprived a man of his right, it will give relief."

Marquez vs. Frisbie, 101 U. S. 473. B. 25 Law. Ed. 800.

Whitcomb vs. White, 214 U. S. 17; Book 53 L. Ed. 891.

We have also assigned as error, that the Court erred in holding and deciding that the Northern Pacific Railway Company had the right to exercise the rights of the Northern Pacific Railroad Company under this grant. We do not desire to argue this matter as a separate and independent assignment of error, but we think this much will be conceded. That the Northern Pacific Railway Company can exercise no rights in the premises except it be by the grace of the Court granted in this case through an exceedingly liberal construction, not only of the language of the grant, and as to the intention of Congress in passing the Act in question, but as to the records of the Land Department, as well.

Where the equities of the case are so strongly with one of the parties as they are with the appellant in the case at bar, equity requires that the respondent shall be held to the strict letter of the law, and nothing will be permitted to be gained by it by construction. In other words where a liberal construction would result in depriving one of that which in equity he ought to have, then the rule of liberal construction will be withheld and a rule of strict construction adopted in order that injustice may not be done.

Public policy also requires that the rule of strict constructions against the railway company under the grant contained in this act should prevail. The courts have adopted that rule and it is wholesome. To make a change in that rule now is to say that there are thousands of settlers upon the public domain of the United States who have in good faith as patriotic citizens, believing in the justice

and fair dealing of their government, gone upon unmarked unoccupied land and established a home. They have suffered the hardships of the pioneer. They are the persons who have been for years and are now extending the line of improvement and civilization. They are the persons who are furnishing and will continue to furnish the tonnage for this railway which is claiming the right to take from them their homes and labor.

During a recent period of years a great spirit of unrest has arisen in this country. As year by year the wealth of the country has been more and more centralized in the hands of a few persons who own these railroads and big lumber corporations, the people have been brought to realize that their rights must be defended strenuously against that wealth and these few men. If the courts do not protect the rights of these people along the lines of provisions of the acts of congress they have no rights. Whatever may be said as to any suggestion made which would seem to be made for the purpose of creating a prejudice against these big corporations the fact still remains that each and all of these corporations will and do demand the last pound. The men who are employed to manage and control the business of the corporation for its stockholders have but one purpose, that to obtain results and money for the stockholders.

In the case at bar, while the men who will benefit by obtaining this property if the decision of the trial Court is affirmed, were living in ease and luxury in the pleasure resorts of this and other countries, the appellant and all of the settlers who are pioneering in the great western coun-

try were suffering hardships which must be undergone in building homes in the unoccupied portions of the United States. They, of necessity, have but a scanty living and the pleasures of life are impossible to them. There can not be a single doubt as to the truth of these conditions. They furnish ample reason for the court to construe the statutes strictly against the strong and powerful corporations in which the wealth of the country is centralized.

We make this contention for the reason that if there were no precedents, such strict construction should be given. This rule, however, is not without precedent.

Furthermore, the construction which we say should be given to the plain language of the Act of May 2, 1899, is not unreasonable but is in entire harmony with the plain import of the language of the act. We say that there is not a person living who could take the description contained in the original selection list in this act and determine where the land therein sought to be described was situated, prior to the time when the government had caused said land to be surveyed and had approved the survey.

We are not asking the Court to make any law. We are simply asking that the law which has been enacted by Congress be fairly construed.

It therefore follows that the decree of the Trial Court should be reversed.

Respectfully submitted,

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Attorneys for Appellant.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

No. 2416.

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY and
NORTHERN PACIFIC RAILWAY
COMPANY,

Respondents.

BRIEF OF NORTHERN PACIFIC RAILWAY
COMPANY.

CHARLES W. BUNN,
CHARLES DONNELLY.

Filed

SEP 16 1914

F. D. Mouckton,

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STATEMENT.

Within the place limits of the grant of lands to the Northern Pacific Railroad Company (13 Stat. 365) were included certain lands now forming part of the Mt. Ranier National Park; and when, on March 2, 1899, Congress passed the act creating that park (30 Stat. 993) it was necessary to obtain a relinquishment of the title thus granted. Accordingly, by sections three and four it was provided:

"Sec. 3. That upon execution and filing with the Secretary of the Interior, by the Northern Pacific Railroad Company, of proper deed releasing and conveying to the United States the lands in the reservation hereby created, also the lands in the Pacific Forest Reserve which have been heretofore granted by the United States to said company, whether surveyed or unsurveyed, and which lie opposite said company's constructed road, said company is hereby authorized to select an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any state into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States: *Provided*, That any settlers on lands in said national park may relinquish their rights thereto and take other public lands in lieu thereof, to the same extent and under the same limitations and conditions as are provided by law for forest reserves and national parks.

"Sec. 4. That upon the filing by the said railroad company at the local land office of the land district in which any tract of land selected and the payment of the fees prescribed by law in analogous cases, and the approval of the Secretary of the Interior, he shall cause to be executed, in due form of law, and deliver to said company, a patent of the United States conveying to it the lands so selected. In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the period of three months after the lands including such tract shall have been

surveyed and the plats thereof filed by said local land office, a new selection list shall be filed by said company, describing such tract according to such survey; and in case such tract, as originally selected and described in the list filed in the local land office, shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity."

The proposition thus made was accepted, and the Northern Pacific Railroad Company, the Northern Pacific Railway Company and the Central Trust Company of New York executed and filed with the Secretary of the Interior a deed releasing and conveying to the United States all claim to lands within the park thus created. (R. 68.)

June 21, 1901, the Northern Pacific Railway Company filed in the United States Land Office at Coeur d'Alene, Idaho, its selection list No. 61, by which, proceeding under section four quoted above, it selected, in lieu of lands released to the United States, certain unsurveyed lands, describing them as "*tracts of land, which, when surveyed, will be described as follows.*" There follows a description of the tracts selected by section, township and range, among them being section 20, township 44 north, range 3 east. (R. 49-54.)

May 15, 1903, the appellant went upon the south-east $\frac{1}{4}$ of section 20, township 44 north, range 3 east, and thereafter, with occasional intermissions, resided upon it. (R. 28.) At that time this township was still unsurveyed, but the south line of the adjacent township, 45 north, range 3 east, had been surveyed some two years before. (R. 34, 82; Appellant's Brief, p. 3.)

July 17, 1905, the official plat of survey of township 44 north, range 3 east, was filed in the land office at Coeur d'Alene, and on that day appellant tendered his application to enter, under the homestead law, the southeast $\frac{1}{4}$ of section 20, township 44 north, range 3 east. His application was rejected on the ground that the land had been selected by the Northern Pacific Railway Company. (R. 3, 12, 40, 41.)

July 31, 1905, the Northern Pacific Railway Company filed in the local land office a new selection list, describing the land in question according to the survey. (R. 54.) October 13, 1910, patent was issued to the railway company. (R. 67-70.)

In this suit appellant asks a decree declaring that he is the owner of the land which he sought to enter, and that the railway company and its grantee, the timber company, hold their title to it in trust for him. He grounds his case upon the proposition (Appellant's Brief, p. 5) that "the description contained in the original selection list was not sufficient to describe any particular land or impart any notice."

ARGUMENT.

Some account of the departmental regulations governing selections of unsurveyed lands is necessary to a clear understanding of the questions involved in this case. The Mt. Ranier Act is not the only one authorizing such selections. They are authorized as well by the act of June 4, 1897 (30 Stat. 11, 36) dealing with forest reserves, and by the act of July 1, 1898 (30 Stat. 597, 620) dealing with the Northern Pacific grant; so that before the enactment of the Mt. Ranier Act the Department was met with the necessity of determining how unsurveyed lands selected under

those acts should be described and identified. Accordingly, it promulgated rules governing such selections. The act of July 1, 1898, provided in terms that "all selections of unsurveyed lands *shall be of odd-numbered sections to be identified by the survey when made.*" The departmental regulations governing selections under this act are dated February 14, 1899, and are to be found in 28 L. D. 103,108. They provide:

"Selections of unsurveyed lands by the railroad claimant are confined to odd-numbered sections or legal subdivisions therein, 'to be identified by the survey when made;' *that is, the selection must be of the whole or some legal subdivision of a designated odd-numbered section, so that the public survey when made will give identity to the land selected.* Selections of unsurveyed lands by an individual claimant must be designated *according to the description by which they will be known when surveyed*, if that be practicable, or, if not practicable, by giving with as much precision as possible the locality of the tract with reference to known landmarks, so as to admit of its being readily identified when the lines of survey come to be extended."

The act of June 4, 1897, is not so explicit as to how unsurveyed lands when selected shall be identified. Indeed it was not until April 14, 1899, when the Department decided on review the first case of *F. A. Hyde*, 28 L. D. 284, that unsurveyed lands were determined to be selectable under that act. This having been determined in that case, however, the Department promulgated regulations May 9, 1899, (28 L. D. 521) which provided:

"Every selection of unsurveyed land *must designate the same according to the description by which it will be known when surveyed, if that*

be practicable, or, if not practicable, must give, with as much precision as possible, the locality of the tract with reference to known landmarks, so as to admit of its being identified when the lines of public survey come to be extended."

Though the Mt. Ranier Act was passed March 2, 1899, it was not until July 1899, after its relinquishment of its granted lands within Mt. Ranier Park, that the railway company was in a position to make selections under it; and at that time, as we have seen, all of the departmental regulations relating to the selection of unsurveyed lands required that such lands, when selected, should be described and identified according to the description by which they would be known when surveyed. Though framed with specific reference to the Acts of June 4, 1897, and July 1, 1898, they were by their terms generally applicable to any selection of unsurveyed lands, and it was not thought necessary, on the passage of the Act of March 2, 1899, to issue additional regulations. Those already in effect were taken as covering *any* selection of unsurveyed lands. *Hanson v. Northern Pacific Railway Co.*, 38 L. D. 491; *Daniels v. Northern Pacific Railway Co.* (decided by Secretary of Interior Aug. 3, 1914, and printed as an appendix to this brief).

Compliance with those regulations was accepted by the Department as a full compliance with the requirements of the law until February 21, 1908. On that date the Department issued a circular (36 L. D., 278), which was by its terms applicable to all forms of "scrips, warrants, certificates, soldiers' additional homestead rights and lieu selections" of whatever kind; and which provided for the posting on the land of notice of the selection, application, or entry. This regulation, of course, was intended to apply to selections under the Mt. Ranier Act, as well as to selec-

tions under the acts of 1897 and 1898. But it was not intended to have—and indeed it could not have been given—a retroactive operation. This is manifest from the language of the circular itself, which although issued February 21, 1908, provided that “the following requirements will govern *on and after April 1, 1908.*” Indeed, in the very decision upon which appellant places his main reliance—the case of *F. A. Hyde, et. al.*, 40 L. D. 284—it is expressly held that the circular of February 21, 1908, has no retroactive effect.

November 3, 1909, a circular was issued (38 L. D. 287) carrying a new regulation applicable to all cases of selections, filings, and locations upon unsurveyed lands, in which, for the first time, it is required that such selections, etc., must describe the land “by metes and bounds, with courses, distances and reference to monuments,” etc., and that the boundaries of the selected land shall be marked out upon the ground. This regulation further provides that “the approximate description of the land by section, township and range, as it will appear when surveyed, must be furnished; or if this cannot be done, an affidavit must be filed setting forth a valid reason therefor.” But it was specifically held in *Hanson v. Northern Pacific*, 38 L. D. 491, that this regulation could not be given retroactive effect.

With this summary of the departmental regulations in mind the court will observe that when, in June, 1901, the railway company selected the lands in question the kind of description which it should make of them was not a matter of choice. It was controlled by the regulations of February 14, 1899, and May 9, 1899. Wherever it was possible to describe land according to the description by which it would be known when surveyed the railway company was not merely authorized but required to do so. It is obvious, there-

fore, that to sustain appellant's contention this court must hold *as matter of law* that that description has not a "reasonable degree of certainty," which was not merely accepted by the Department as being reasonably certain in *fact*, but was *prescribed* by the Department, *sua sponte*, as answering most nearly to the law's requirements.

The court below declined to hold this and clearly it was right in doing so. The question whether a given description identifies lands with "a reasonable degree of certainty" is essentially one of fact. It is a question which, from the very necessities of the case, must, in the first instance, be decided by the Land Department. Considering the nature and character of his duties, the Land Commissioner may be supposed to know, better perhaps than any one else, whether a given description is reasonably certain; and there is a special propriety in committing the question to him for determination. It is doubtless true that the discretion thus vested in that Department may not be arbitrarily exercised. The Land Commissioner may not say that that is a reasonably certain designation which cannot be taken to designate anything at all. But within reasonable limits, it is plain that the decision by one administrative department whether a given description is reasonably certain is as much a decision of a question of fact as is the decision by another administrative department whether a given rate or practice is reasonable; and whether such questions are decided by the Land Department or by the Interstate Commerce Commission, the decision in the absence of fraud or arbitrary action is not reviewable by the courts. *Interstate Commerce Commission v. Illinois Central R. R.*, 215 U. S. 452; *Interstate Commerce Commission v. D. L. & W. R. R. Co.*, 220 U. S. 235;

Interstate Commerce Commission v. U. P. R. R. Co.,
222 U. S. 541.

As said by the supreme court in *Burfenning v. Chicago, Etc., Ry. Co.*, 163 U. S. 321-323:

"It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be reexamined. *Johnson v. Towsley*, 13 Wall. 72; *Smelting Company v. Kemp*, 104 U. S. 636; *Steel v. Smelting Company*, 106 U. S. 447; *Wright v. Roseberry*, 121 U. S. 488; *Heath v. Wallace*, 138 U. S. 573; *McCormick v. Hayes*, 159 U. S. 332."

In *Wisconsin Central R. Co. v. Price County*, 133 U. S. 496, the Court, speaking of the function of the Secretary with respect to the issuance of patents for indemnity land, said:

"His action in that matter was not ministerial but judicial. He was required to determine in the first place whether there were any deficiencies in the lands granted to the Company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions he had also to in-

quire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed."

Finally the decision of this court in *Groeck v. Southern Pacific R. Co.*, 102 Fed. Rep. 32, 34, is directly in point. This was a suit by the Southern Pacific Railroad Company to declare Groeck trustee of a patent title granted to him under a pre-emption entry, the Railroad Company claiming under its land grant act of July 27, 1866. The land had been selected by the Railroad Company as indemnity and its selection had been rejected because in conflict with the pre-emption claim of Groeck. The Court said:

"Considering the language of the grant, it must be held that indemnity lands are selected under the direction of the secretary of the interior whenever the grantee thereof complies with the directions which the secretary has published for the regulation of such selection. The secretary was not clothed with the power to defeat the grant of the indemnity lands, or by capricious regulation to affect the title which was intended to be conveyed. Nor has the secretary in this instance made any regulation which has injuriously affected the right of the grantee. *He had the power to prescribe in advance the method of making such selection, and, having prescribed it, and his directions having been followed, it cannot be said that the lands were not selected in the manner required by the granting act.*"

A determination that the description in question designated the land with a reasonable degree of certainty will hardly be called an arbitrary one. To call it this would be to accuse Congress itself of arbitrary action.

The act of July 1, 1898, provides in terms that "all selections of unsurveyed lands shall be of odd-numbered sections to be identified by the survey when made." (30 Stat. 620.) The possibility of identifying lands according to the description by which they will be known when surveyed is here distinctly recognized; and surely no court can say that that description is under one law so inadequate as to be arbitrary, which under another law was recognized by Congress itself as being so appropriate that it was specifically required.

Nor is it difficult for anyone, acquainted as every member of this court is with the legislation affecting public lands in the Western states, to understand why that form of selection should have been specified and required. Speaking generally, it is, perhaps, the very best method of designating or describing unsurveyed lands that could be devised. Situations may of course be imagined where lands are so remote from any public survey that this form of designation would give little information as to the locality in which they lie, and as said by the court below (R. 82), it might well be held that as to lands so situated such a designation would not be reasonably certain. But in the present state of public surveys such situations are not numerous—certainly not along the lines of the land grant railroads; and for many years settlements on unsurveyed lands within the boundaries of the grants to those railroads have been made with direct reference to the description by which they should be known when surveyed. The grants to the railroad companies included all odd numbered sections, whether surveyed or unsurveyed, which at date of definite location were free from any claims or other rights; and the settler knew when initiating a settlement that if the land settled upon proved to be an odd-numbered section, he must

relinquish it to the railroad company. Knowing this, he has made his settlement with direct reference to the public survey.

To say that when the adjacent township lines have been run, it is impossible or even difficult to determine with reasonable certainty where a given section will lie, is to fly in the face of facts with which most residents of the Western states are familiar. As already stated, when, on June 21, 1901, the railway company filed the selection list in question, the southern line of township 45 North, range 3 East had been run. Suppose that, instead of selecting a tract of land "which, when surveyed, will be described as section 20, township 44 North, range 3 East," the railway company's description of the tract thus selected had been as follows: "Commencing at a point distant three miles due south from a point on the south line of township 45 north, range 3 east, one mile east of the southwest corner of said township; thence due east one mile; thence due south one mile; thence due west one mile; thence due north one mile to the point of commencement." Here we have a "metes and bounds" description, and as such it would satisfy appellant's objection. Yet can anyone doubt that the description actually used by the railway company means the same thing? Or can it be doubted that anyone interested in the lands would gather that meaning from it? And is it not apparent that in marking the boundaries of the land involved in this suit, the party from whom appellant purchased had himself defined or marked them by exactly that kind of anticipatory identification of them with the official survey which appellant now says was impossible? The testimony of the witness who helped to mark these lines is that the southwest corner of township 9 north, range 3 east, having been run, they "carried their lines in from the south line of that township," and "under-

took to tie them up to the government lines." (R. 34.) It was lines so run that the appellant found blazed upon the land when he went into possession in 1903. (R. 28.) Doubtless these blazed lines were not exactly coincident with the official survey lines as finally determined; and it is possible (though less likely), that such a metes and bounds description as we have supposed above would not coincide exactly with the lines of section 20. The corrected list in the one case and the application to make homestead entry in the other would definitely determine the land claimed. But it is clear that the language by which the Railway Company "designated" the land selected was the perfectly definite and intelligible equivalent of the best metes and bounds description that could have been devised; and it is surely no objection to it that it describes or indicates lines which *must* coincide with the lines of the official survey, instead of lines which might not do so.

We proceed now to notice certain points made in appellant's brief.

1. Counsel's main reliance throughout has been on the decision of the Secretary of the Interior in the case of *F. A. Hyde, et. al.*, 40 Land Decisions, 284. This decision is quoted *in extenso* in appellant's brief (p. 9-12), and it is safe to say that had it not been rendered this suit probably never would have been begun. Now, as said by the Secretary in the recent case of *Frank O. Daniels v. Northern Pacific Ry. Co.*, decided August 3, 1914, even in the *Hyde* case "it was unequivocally held that such a description was valid as against the government;" but it is undeniable that the general trend of the argument in it does support appellant's contention; and were it not for the recent

decision of the Department in the case of *Daniels v. Northern Pacific Ry. Co.*, *supra*, we should be addressing this court, as we addressed the court below, under the disadvantage of having that decision against us. But by his decision rendered August 3, 1914, in the *Daniels* case, the Secretary has expressly overruled the decision in the *Hyde* case, and, following the decision of Judge Dietrich in the present case, has held unequivocally that a designation of unsurveyed land according to the description by which it will be known when surveyed does identify the land described with a reasonable degree of certainty and is a full compliance with the requirements of the Act of March 2, 1899. We print in full the Secretary's decision in the *Daniels* case as an appendix to this brief.

2. Counsel say (p. 13) that "both the Commissioner of the General Land Office and the Department of the Interior have, without exception, followed the construction contended for by appellant as to the Act of March 2, 1899, and other kindred acts in all matters pertaining to lieu selections, with the single exception of the decision in appellant's case."

This statement is not correct. The truth is that in no case, except the case of *F. A. Hyde*, *supra*, has that construction been followed. As said by the Secretary in the *Daniels* case, *supra*, "the practice of describing unsurveyed lands in terms of a future survey thereof *has been in existence for many years* and was never challenged prior to the decision of *F. A. Hyde*, et. al."

Again in the case of *Hanson v. Northern Pacific Railway Company*, 38 Land Decisions, 491, the lands selected had been described in terms of a future survey and the validity of the selection was questioned on the ground that such a selection did not comply with

the requirements of the regulations of Nov. 3, 1909. The Secretary said, however, "that the practice of allowing selections by the Railway Company as these selections were made, *had been of such long standing and such uniform practice* that it would be unfair, if not illegal, to give retroactive effect to such regulations."

3. Speaking of the fact that the act of July 1, 1898, specifically authorized such selections as those here in controversy and that the Act of March 2, 1899, did not, counsel say :

"If Congress had intended to continue to grant to the Railroad Company the right to make lieu selections by simply filing lieu selection lists, describing the lands according to what they might be when surveyed, it is clear they would have continued the use of the language found in the Act of July 1, 1898, above quoted. The fact that Congress has expressly discarded the phraseology employed in the Act of July 1, 1898, and employed language which was so plainly in conflict with the regulations of the Department promulgated under the Act of July 1, 1898, clearly manifests that they could have had no other object or purpose in view than that of annulling the practice theretofore established of permitting the Railroad Company to make lieu selections by describing the lands according to what it would be when the survey was made. In other words, subsequent to July 1, 1898, and prior to or at the time of the passage of the Act of March 2, 1899, Congress must have been informed of the conflicts arising between the settlers and the Railroad Company by reason of the practice of the Railroad Company under the Act of July 1, 1898, and have used the language found in the Act of March 2, 1899,

for the express purpose of avoiding any further conflict between the settler and the Railroad Company."

How extremely tenuous is this argument will be apparent to the court when it is remembered that the "regulations of the Department promulgated under the Act of July 1, 1898" were not promulgated until February 14, 1899. (28 L. D. 103). The idea that within the sixteen days intervening between February 14, 1899, and March 2, 1899, conflicts arose between settlers and the Railroad Company and were brought to the attention of Congress, moving that body to alter the language of the Act of 1898, will hardly be considered seriously by anyone.

4. Counsel argue that because the Act provides for the filing of a second list after survey in case the description in the first list does not precisely conform to the lines of the official survey, it is therefore apparent that description in the original list in terms of future survey was not contemplated. This argument is answered so completely by the court below that we cannot do better than quote what is said by Judge Dietrich:

"By the plaintiff much significance is attached to the clause in the latter part of the act, which provides that, 'In case such tract (of unsurveyed land) as originally selected and described in the list filed in the local land office shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity.' It is urged that such a method as was followed here admits of no variation or discrepancy requiring adjustments. *The argument rests wholly upon*

the assumption that if the method is authorized at all, it is exclusive; but such an assumption is plainly unwarranted. The Act does not purport to require any given form of description, but upon the other hand gives the widest latitude; its only requirement is that in the selection list the land shall be designated with 'reasonable degree of certainty;' the method of designation is immaterial provided it identifies the land. It was doubtless anticipated that different methods would be employed, and the provision above quoted was intended to point out the course to be pursued in cases where the original description is not tied to the lines of an official survey, as here."

5. Counsel speak of the Act of March 2, 1899, as a "grant," and they invoke the rule that public grants shall be construed strictly against the grantee. As pointed out by the court below (R. 85), the Act was not a grant, nor has the Department ever so regarded it. The following language quoted by the court below from the decision of Assistant Secretary Pierce in *State of Idaho v. Northern Pacific Railway Company*, 37 L. D. 135, 138, undoubtedly places the right construction upon it:

"It was deemed necessary to the accomplishment of its purpose that the United States should own the land placed in reservation by the act (original land grant act). A voluntary conveyance by the Railway Company was the most feasible method of re-acquiring title to the granted land, and a right of exchange upon the terms and conditions set forth was the consideration offered to induce the company to transfer its title. An offer is made by one party of which acceptance by the other is invited. The act is contractual in character, and terms and conditions not clearly

expressed are not to be lightly imposed after acceptance of the offer."

Counsel insist, however, (p. 18) that the Act of March 2, 1899, "is a grant in fact"; and they add that "the Honorable Commissioner of the General Land Office has so construed this very act," citing *Northern Pacific Railway Company*, 40 L. D. 441. We know of no such decision of the Commissioner of the General Land Office. If there is any such, counsel should state where it is to be found. If by the citation, in this connection, of the case of *Northern Pacific Railway Company*, 40 L. D. 441, they mean that any such construction was given to the Act in that decision, they are distinctly in error. That was a decision, not of the Commissioner of the General Land Office, but of the First Assistant Secretary of the Interior. It had nothing to do with the question whether the Act of March 2, 1899, was or was not a grant. It dealt solely with a contention of the railway company that areas within Mt. Ranier Park, which were covered by glaciers, might be accepted as bases for lieu selections under the Act of March 2, 1899, and it rejected the contention. This was the sole question before the Department and beyond the decision of it the opinion does not go.

6. Counsel see "the hand of the railroad company" in the drafting of the act "for the reason that while the railroad company is given the right to select from the surveyed and unsurveyed public lands of the United States, the settler upon the lands sought to be set aside as the Mt. Ranier National Park is granted, in lieu of his rights, the right to select only surveyed lands." (Appellant's Brief, p. 19.)

Counsel are wrong, not only as to their inference, but as to the ground on which they rest it. It is not true that the settler is given the right to select only surveyed lands. He has the same right to select unsurveyed lands that is possessed by the railway company. The Act provides specifically that "any settlers on lands in said National Park may relinquish their rights thereto and take other public lands in lieu thereof *to the same extent and under the same limitations and conditions as are provided by law for forest reserves and national parks.*" The conditions "provided by law for forest reserves" are those named in the Act of June 4, 1897, (30 Stat. 11, 36); and as we have seen that Act allows of the selection by the settler of land either surveyed or unsurveyed. *F. A. Hyde*, 28 L. D. 284.

7. At page 30 of their brief, and apparently as a kind of makeweight, counsel suggest, rather than argue, that the Northern Pacific Railway Company had no right to select lands under the Act, because the right of selection was given only to the Northern Pacific Railroad Company. That the railway company is the legal successor of the railroad company they do not deny. The patent contains an express recital that it is; the Attorney General has ruled that it is (21 Opinions Attorney General, 486; 25 Opinions Attorney General, 401); and this court (177 Fed. 804) and the Supreme Court of the United States (228 U. S. 482) in the case of *Northern Pacific Railway Company v. Boyd*, after a full examination of the foreclosure proceedings, ruled to the same effect; for though both courts held that there rested upon the railway company an obligation to discharge the indebtedness of the old company to non-assenting, unsecured

creditors, it was distinctly held (228 U. S. 502) that the property of the old company was "transferred to a new company" and that the transaction was "binding between the parties." Under these circumstances the contention must be—and as already stated, what it actually is we can only surmise, for counsel have not argued the point—that the offer of exchange was a personal one to the *railroad* company alone.

But when considered in the light of the circumstances attending its passage and approval, it is apparent that the Act is not so limited. As stated above, it was in no sense a grant. It was an offer to exchange lands. Rights were outstanding in certain territory which the government wished to obtain; and for them, it was willing to give other lands of equal area in exchange. It could not care from whom it obtained these rights or who got the lands given in exchange for them. When the Act of March 2, 1899 was passed the foreclosure proceedings by which the railway company has succeeded to the property and franchises of the *railroad* company had long since been concluded; and Congress knew this, for, in the Act of July 1, 1898 (30 Stat. 621) it had referred to the foreclosure proceedings, and had provided that the question of the railway company's successorship, should it ever be raised, should be determined wholly without reference to the provisions of that act. It knew, as that act shows, that the railway company possessed and asserted the right to dominion over the property and franchises of the *railroad* company. Therefore, as said by the court below, "unless we hold either that by

inadvertence the *railroad* company was named while the *railway* company was intended, or that the privilege conferred upon the *railroad* company is assignable, plainly the Act (of March 2, 1899) becomes wholly ineffectual for any purpose."

The decree of the court below should be affirmed.

CHARLES W. BUNN,
CHARLES DONNELLY.

APPENDIX.

DEPARTMENT OF THE INTERIOR,
WASHINGTON.

August 3, 1914.

D-16944.

FRANK O. DANIELS,	}	"F"
vs.		Lewiston—2710.
NORTHERN PACIFIC RAIL-		Contest affidavit rejected.
WAY COMPANY.		Affirmed.

APPEAL FROM THE GENERAL LAND
OFFICE.

Frank O. Daniels has appealed from the decision of the Commissioner of the General Land Office dated May 12, 1911, rejecting his affidavit of contest against the selection by the Northern Pacific Railway Company for the S $\frac{1}{2}$ of the NE $\frac{1}{4}$, N $\frac{1}{2}$ of the SE $\frac{1}{4}$ Section 30, 42N., R. 4 E., B. M., Lewiston, Idaho, Land District.

The railway selection involved in this proceeding was filed in the local office on July 11, 1901, under the provisions of the act of March 2, 1899 (30 Stats., 993). It embraced the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$, and the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$, Section 30, but not the SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ and NW $\frac{1}{4}$ of the SE $\frac{1}{4}$, said section, as alleged in the affidavit of contest and in the appeal.

The western boundary of this township was surveyed between July 29 and August 2, 1903; the northern, southern and western boundaries in April and May, 1905, and the subdivisional lines were run during September, 1905; the township plat of survey was filed in the local office on July 1, 1909, and on July 28, 1909, the railway company filed a rearranged list describing the land, under the survey as in its original selection tendered in 1901.

On July 1, 1909, the date on which the plat of survey was filed in the local office, Frank O. Daniels tendered his homestead application for the S $\frac{1}{2}$ of the NE $\frac{1}{4}$ and the N $\frac{1}{2}$ of the SE $\frac{1}{4}$, section 30, Tp. 42 N., R. 4 E., B. M., alleging settlement on August 10, 1904, continuous residence since that date and sundry improvements. The local officers rejected this application as to the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$, and the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$, for conflict with the railway selection. From this action Daniels appealed and subsequently filed an affidavit of contest against the selection alleging, in addition to settlement, residence, and improvements on and after August 10, 1904, that the selection was illegal and void, inasmuch as the company had wholly failed to post notice thereof on the land, and that he had had no notice, actual or constructive, of the selection at the date of his settlement. The local officers rejected this affidavit of contest upon the ground that it stated no cause of action. The Commissioner affirmed their decision and Daniels' appeal brings the matter before the Department.

The act of March 2, 1899, *supra*, provides, in Section 3, that upon the filing of a proper deed of release or conveyance to the United States of a tract of its granted land within the Mount Ranier National Park, the Northern Pacific Railway Company is authorized to select an equal quantity of non-mineral public land, so classified at the time of survey. In Section 4, it is provided that:

"In case the tract so selected shall, at the time of selection, be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty, and within a period of three months after the lands including such tract shall have been surveyed and the plats thereof filed by the said local land office, a new selection list shall be filed by said company describing such tract according to such survey."

It is clear that the act, as to unsurveyed lands calls for a description at the date of selection, describing and designating the selected tract with reasonable certainty, and that the reasonable certainty of the description is dependent upon facts in existence at the date of selection. In order to dispose of the question raised by this appeal, it will be necessary, therefore, to consider, first, the several acts of Congress permitting settlement upon, location and selection of unsurveyed public lands and the nature of the right acquired by such settlement, location or selection; second, the requirements of the land department as to descriptions of unsurveyed lands selected, located, or entered; third, the sufficiency, under said act of March 2, 1899, of the description given in this case by the railway company, it being conceded that the only description furnished by the company in its original selection list was that the land when surveyed would be the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$, Section 30, Tp. 42 N., R. 4 E., B. M., Idaho; and fourth, was the selected tract non-mineral public land, so classified at the date of survey.

Congress has passed a number of acts permitting the location of scrip upon public lands for the purpose of satisfying and extinguishing legal or equitable claims, among which the most important are those of July 17, 1854 (10 Stats., 304), and of April 5, 1872 (17 Stats., 649).

The act of March 3, 1877 (19 Stats., 277), known as the Desert Land Act, required that the declaration provided for shall particularly describe the land, if surveyed and, if unsurveyed, shall describe the same as nearly as possible without a survey. Under the provisions of this act and of the amendatory act of March 3, 1891 (26 Stats., 1095), desert land entries of unsurveyed lands were made until the passage of the act of March 28, 1908 (35 Stats., 52).

The act of February 8, 1887 (24 Stats., 388), provided for the allotment to Indians of unsurveyed lands.

The act of June 4, 1897 (30 Stats. 11, 36), provided:

"That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent."

The act of July 1, 1898 (30 Stats., 597, 620), authorizes selection by the Northern Pacific Railway Company of unsurveyed land in "odd-numbered sections, to be identified by the survey when made." This act also permits a *bona fide* settler upon lands to which the railway grant had attached, to relinquish his claim thereto and make a lieu selection. This act was amended by the acts approved March 3, 1901 (31 Stats., 950), and May 17, 1906 (34 Stats., 197), which do not affect the selection of unsurveyed land. Following the act of July 1, 1898, *supra*, came the act under which this selection was made, and the act of April 21, 1904 (33 Stats., 189, 194), for the selection by the Turtle Mountain Indians of vacant land belonging to the United States.

Early in the history of these acts permitting location and selection of unsurveyed land, the Department was called upon to define the nature and extent of the interest acquired by the locator or selector. The principle was announced by the Supreme Court of the United States in *Frisbie v. Whitney* (9 Wall., 187); *Yosemite Valley case* (15 Wall., 77); and *Buxton v. Traver* (130 U. S., 235) to the effect that no portion of the unsurveyed public domain, except in special cases not affecting the general rule, is open to sale. This principle was applied by the Department to a location of Valentine scrip in the case of *Henry Bruns* (15 L. D., 170), wherein it was held that the act of April 15, 1872, *supra*, conferred upon Valentine, or his representatives, the right to select—

"public lands of the United States, in legal subdivisions whether surveyed or unsurveyed. * * * *

and thus to initiate an inchoate right to purchase said land in preference to other when it was surveyed and came into market, in the same manner that a settler by the occupation of a tract of land acquires a preference right to purchase the same by taking the proper steps after the filing of the township plats. But it did not deprive Congress of the power to make any other disposition of the land before it was offered for sale, nor did the United States by these acts enter into any contract with the settler or locator, or incur any obligation to any one that the land so occupied or located should ever be offered for sale. * * * *

The filing of this scrip upon unsurveyed land does not segregate the land covered thereby, nor is it such an appropriation of the tract as will prevent others from initiating claims thereto, upon the same principle that more than one settlement may be made and more than one declaratory statement filed for the same tract.

These inchoate rights are all subject to the right of the prior claimant, and, if he fails to perfect his claim after survey within the time required by law, it is then subject to the right of the next claimant in order of priority."

The controversy under consideration is, therefore, between two preference right claimants, one under the act of March 2, 1899, and the other under Section 3 of the act of May 14, 1880 (31 Stat., 140). From what has hereinbefore been stated it is clear that the preference right of the railway company first attached if the land was subject to appropriation and the selection was in proper form.

The practice of describing unsurveyed land in terms of a future survey thereof has been in existence for many years, and was never challenged prior to the decision of *F. A. Hyde, et al.* (40 L. D., 284). Prior to the date of that decision the Department had promulgated the regulations of November 3, 1909 (38 L. D., 287), which, in addition to a requirement that applications for unsurveyed land should contain an

approximate description by section, township and range, as it will appear when surveyed, required also a description by metes and bounds with courses, distances and reference to monuments.

Not only have descriptions of unsurveyed land in terms of a future survey been recognized in departmental practice, but, as has been stated, such descriptions are required by the regulations now in force as an essential part of the description in all applications for unsurveyed land. Indeed, in the instructions of May 9, 1899 (28 L. D., 521), under the act of June 4, 1897, *supra*, was incorporated a provision broad enough to cover all selections of unsurveyed land under any act of Congress in which the only requirement as to description was that the land should be designated according to the description by which it would be known when surveyed, if that be practicable. This rule was applied by the land department to all selections of unsurveyed lands until the adoption of the regulations of November 3, 1909, *supra*. See *Hanson, et al., v. Northern Pacific Railway Company* (38 L. D., 491), a case which arose under the act of March 2, 1899, *supra*.

The practice of describing unsurveyed lands in terms of a future survey thereof has been followed in many Executive proclamations involving wide areas of public land. See the Proclamations of October 15, 1892 (27 Stats., 1034, 1038); December 20, 1892 (27 Stats., 1049); July 27, 1892 (27 Stats., 1053); September 28, 1893 (28 Stats., 1240); February 22, 1907 (29 Stats., 906, 907, 909, 911); May 10, 1898 (37 Stats., 1771); April 3, 1901 (32 Stats., 1969); March 2, 1909 (35 Stats., 2247).

Congress also, in the act of July 1, 1898, followed the precedent established by departmental practice and sanctioned the propriety and validity of selections in terms of a future survey by specific requirement that the selected lands, under that act, be so described.

The custom of describing unsurveyed lands, as was attempted by the railway company in this case, is founded upon administrative considerations growing out of the method in which the records of the land

department are kept and its business conducted. While the metes and bounds description of selected unsurveyed land should always have been, as it now is, required, it is obvious that without some reference to existing or future surveys, such a description could not be so noted upon the public records, especially the tract books of the local office and of the General Land Office, as to advise the public of the existence of the selection. If a selection of a specific tract, identified by reference to a survey, be filed in the local land office the register and receiver are enabled to note the claim in its appropriate place. If the land be actually surveyed and the plat of survey be on file the selection gives notice to the world of the existence of the claim in the absence of a requirement of law or regulation that notice be given upon the land selected also. This would be also true of a selection in which the tract, under the act of March 2, 1899, *supra*, is described in terms of a future survey, if such selection complies with the requirement of law that the description designate the land with a reasonable degree of certainty. The only notice of selection required by said act is the filing of the list in the local office.

To be of any avail, as notice, it requires no argument to demonstrate that the land must be described in such a way that the fact of selection may be noted upon the record in its appropriate place.

Selection like the one here under consideration having, therefore, the sanction of departmental practice and regulations, of Executive proclamations, and of at least one act of Congress, and having been predicated upon sound administrative reasons, especially that of notice to the land department and of the public of the approximate locality of the claim, the Department will consider the objection that a description in terms of a future survey does not designate the land with a reasonable degree of certainty. Attention has heretofore been directed to the act of July 1, 1898, in which Congress required that a selection of unsurveyed land by the railway company should be of "odd-numbered sections to be identified by the survey, when made." It is a fair inference that Congress, in pass-

ing this law was familiar with the practice of the Department in permitting locations and selections under such description, and advisedly ratified and applied that practice to selections under the act. Had such a description as the one involved in this proceeding lacked any element of reasonable certainty, in the judgment of Congress, no such requirement as to the description of selected unsurveyed land would have been placed in the act of 1898. The requirement in the act of 1899, that the land selected be described with a reasonable degree of certainty must be construed in the light of the act of 1898, which was, in fact, a **determination** by the law-making branch of the Government that a description in terms of a future survey was sufficient and valid.

It is universally known throughout public land states that theoretically a township is six miles square, and that a section is a mile square. The locus of any section within a township with reference to the other sections thereof is likewise a matter of common knowledge. When, therefore, a selection is filed describing the land as "what will be, when surveyed," Section 30, it will be understood as embracing land in a section whose western boundary is the western boundary of the township whose southern boundary is a line one mile north of the southern boundary of the township, and whose eastern and northern bound 5 and 4 miles, respectively, distance from the eastern and northern township lines. If, therefore, at the date of the selection any line of the public survey has been established in the vicinity of the selected land, it is not believed that a selection like the one under consideration lacks, in fact, any element of reasonable certainty. The locus of the section having been ascertained by considering, as the public generally considers, the section line as being one mile long and the township boundaries as six miles in length, the position of a subdivision of section can be readily determined. It is common knowledge also, that when townships are actually surveyed in the field, many of them display marked eccentricities of outline due to reasons not necessary to be here considered. Such eccentricities might be so

marked as to throw section 30, for example, when surveyed, entirely without its theoretical boundaries with reference to the nearest surveyed township. Such a contingency, however, would have no bearing on the rule hereinbefore announced though it would render necessary an adjustment of the selected tract to its appropriate description under the plat of survey.

The Department is convinced that when in this case, the selection was filed in the local office, describing the land sought as what will be when surveyed the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$, Section 30, T. 42 N., R. 4 E., B. M., the register and receiver and every person who took pains to examine the list understood that the western and eastern boundaries of the tracts selected were, respectively, three-quarters of a mile and a mile east of the western boundary of the township and that its southern and northern boundaries were one and a quarter and one and three-quarters miles north of the southern township line.

By reference to the plat of survey of township 42 N., R. 4 E., B. M., Idaho, it appears that none of the township boundaries had been surveyed when this selection was filed. The southwest corner of the township, however, had been fixed in July, 1899, through the survey at that time of the southern boundary of township 42 N., Range 3 E., B. M. There was in existence, therefore, at the date of the selection, a monument of the public surveys within less than two miles of the land under consideration. More than a year before the date of Daniels' alleged settlement upon the land now claimed by him, the eastern boundary of this township was surveyed, and by running the line from the south end of this township line, due west to the ascertained southwest corner of the township, Daniels could have discovered that the distance was exactly six miles. The precise locus of the land selected by the railway company, could, therefore, not only have been found to a reasonable certainty at the date of the selection, but fixed to a mathematical certainty at the date of Daniels' alleged statement.

In the case of *Andrew West v. Edward Rutledge Timber Company and Northern Pacific Railway Company*, decided by the District Court of the United States for the district of Idaho, northern division, on July 22, 1913, involved land in this vicinity and a selection by the railway company under the act of March 2, 1899, it was held that a description like the one here under consideration was, in effect, a metes and bounds description and fully complied with the requirement of the law that the selected land should be described with a reasonable degree of certainty.

It has been urged with great force and earnestness that a description of land in terms of a future and non-existent survey is a nullity and that, therefore, a selection so describing the land is wholly void. This position is entirely without support in any case adjudicated by the land department. Even in the case of *F. A. Hyde, et al.* (40 L. D., 284), cited and relied upon by the appellant, it was unequivocally held that such a description was valid as against the Government. If it was a good description against the Government, as it was, and if it conformed to a long and well-established practice and was accepted by the land department as sufficient, it initiated a claim to the land which cannot be ignored in favor of a claimant subsequent in point of time.

It is urged that the field notes of survey of this land do not in express terms classify it as non-mineral. It is customary for surveyors, in their returns, to designate mineral lands as such, and all land not classified as mineral by them is regarded as having a non-mineral or agricultural classification. This rule is so well understood by surveyors and by officers of the land department that land not returned as mineral is held to be as effectually classified as agricultural land as if so returned in the field notes. It must be assumed that this rule, frequently referred to in the decisions of the land department, was known to Congress when the act of March 2, 1899, was passed. It could not have been the purpose of Congress to confer upon the railway a right of selection incapable of exercise upon any land then surveyed, practically none of which had

been in express terms classified as agricultural and incapable of exercise upon any land to be surveyed in the future under the administrative rule, above referred to.

After mature consideration the department is constrained to hold that selections of lands made prior to the adoption of the regulations of November 3, 1909, *supra*, describing the tracts in terms of a future survey and accepted by officers of the Department pursuant to its regulations and practice confer upon the selector a preference right to the lands upon their identification by actual survey. If, as is alleged, the selections were not noted upon the records by the local officers, such default on their part did not affect the right of the railway company, which was complete when they had fulfilled the law's requirements. The case of *F. A. Hyde, et al.* (40 L. D., 284), and all others in conflict herewith are accordingly overruled and the decision appealed from is affirmed.

A. A. JONES,
First Assistant Secretary.

In the
**United States Circuit Court
of Appeals**
FOR THE NINTH CIRCUIT

No. 2416.

ANDREW WEST,

Appellant,

vs.

EDWARD RUTLEDGE TIMBER COMPANY and
NORTHERN PACIFIC RAILWAY COMPANY,

Respondents.

Brief for Respondents.

JAMES B. KERR,
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THE PIONEER COMPANY, ST. PAUL

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IN THE
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No. 2416.

ANDREW WEST,

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EDWARD RUTLEDGE TIMBER COMPANY and NORTHERN
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Respondents.

Brief for Respondents.

Statement.

The brief which has already been filed on behalf of the Northern Pacific Railway Company by Mr. Bunn and Mr. Donnelly contains a very clear and concise statement of the essential facts, and presents in an entirely satisfactory way the argument for respondents on the question which we consider the pivotal point in the case. We fully concur in the view that the question to which Mr. Bunn and Mr. Don-

nelly have confined their brief is the vital and essential question before the court, and that the disposition of the case can and should turn upon that question alone. This was the view which controlled the writers in the argument of this case in the court below, and of the cases in the Department of the Interior which culminated in the Secretary's decision in *Daniels vs. Northern Pacific*, printed as an appendix to the brief of Mr. Bunn and Mr. Donnelly. But while this is so, and while we do not purpose to re-traverse any of the ground so well and effectively covered in the brief of our associates, there are nevertheless certain features of the case, in matters of fact and of law, not touched upon in that brief, which (by way of extreme precaution) we desire to put before the court in order that its consideration of the case may be founded upon a full comprehension of all its phases.

It may be well to emphasize the fact that West, the appellant, did not initiate his claim until two years after the rights of the respondent Railway Company had attached. The Railway Company filed its selection list on June 21, 1901, and West did not go upon the land until May 15, 1903. (Record, pp. 28, 53, 63). There is no dispute as to the priority, in point of time at least, of the Railway Company's claim. West can prevail only upon the theory that this claim was inherently invalid from its inception. If the selection was good, in the sense that the land was of a character subject to that form of appropriation, and that the railway company sufficiently complied with the law in matters of procedure, then it is clear that West acquired no rights by his settlement, and the Department properly rejected his application and issued the patent to the Rail-

way Company. In other words, West's case rests wholly upon the idea that the Railway Company's procedure was fatally defective in some respect essential to the validity of the selection, or that the land was not of such a character that it could lawfully be selected under the act of 1899. Unless this is so, the maxim "first in time, first in right" controls.

Although this particular land was still unsurveyed at the time of West's first act of settlement, it was regularly surveyed in the field and the lines of survey run and marked by the Government surveyors, in the first week of July, 1903—that is, not more than six or seven weeks after West went upon the land (Record, p. 31). And manifestly when the survey boundaries of the land were so established by the surveyors, and precision thus given to the description employed in the Railway Company's selection list, West had put practically nothing into the venture except the consideration paid Hanson. He had doubtless performed the "acts of settlement" necessary to secure priority as against a *subsequent* claimant; but the evidence does not permit the inference that within this period of six weeks he had made any substantial expenditure of time, effort or money in pursuing his claim. And, whatever doubt or uncertainty might, under appellant's theory of the case, have inhered in the form of description used in the Company's selection, was removed by the survey in the field. In this connection the court is respectfully referred to the Secretary's decision of June 13, 1914, in the case of McDonald v. Northern Pacific, a certified copy of which will be filed with the clerk.

When West went upon the land he did not, as he alleges in his complaint (Record p. 2), find a virgin wilderness with nothing to indicate the possibility of prior appropriation. On the contrary he found a cabin and clearing, blazed boundaries, and posted notices declaring that the

land was claimed by one John Hanson, with whom West bargained for the "improvements" and possessory rights. Hanson had made settlement and built a cabin in the summer of 1902, the year before West's claim was initiated, but a year or more *after* the selection of the land by the Railway Company. It is apparent that the boundaries of Hanson's claim were intended to be coincident with the lines of the quarter section as it would be established by the survey, and that this was understood by West. The testimony of appellant's witness Edin shows that he himself ran the lines of this claim for Hanson, and that he "undertook to tie them (the quarter section lines) up to the Government lines which had already been run, as near as we could." The nearest "government line" at that time was the south line of Township 45, Range 3, which was the north line of the township in which is situated the land in controversy. As soon as the field survey of this township was made, West readjusted the lines of his claim to conform to the survey lines, which varied somewhat from those run by Edin. (Record, pp. 28-31, 33-34.) It cannot be doubted that West knew that his settlement was on what would be the northeast quarter of Section 20, and that the form of description used in the company's selection was amply sufficient to inform him of the existing conflict, even before the survey in the field—which was made but six weeks after his settlement was initiated.

The land in controversy is rough, broken and mountainous, and heavily timbered with timber of the most valuable kind. It may be true that if the timber were removed a part of the land would be susceptible of cultivation of a sort. But no one familiar with the conditions in that country would for a moment believe that permanent residence or continued cultivation is ever in the mind of the settler on land of this character. The value of the land is in the timber, and the course of the lumber in-

dustry in that country is such that the unvarying history of claims of this kind is that as soon as the claimant has acquired title he sells out—land, timber and all—to some lumber company and moves off the land; if indeed he has not moved off immediately after final proof.

Much is said by appellant's counsel of West's sacrifices, and of the time and money he has spent in the effort to acquire this valuable tract of timber. And the argument moves on the basis that all this expenditure and sacrifice were made in ignorance of the existence of any prior claim to the land, and that this ignorance was due to the failure of the Railway Company to mark out the limits of its claim by monuments and blazed boundaries, and to the fact that the selection list described the land in terms of future survey; which, counsel insists, did not enable West to identify the land selected with that upon which his settlement was made.

It may be true that when West went upon the land he did not know that it was subject to a prior selection by the Company. He says he did not, and his testimony was, from its nature, not open to contradiction. But if this is so, it is because West neglected to inquire whether the public records disclosed a prior appropriation. For the allegation of the complaint and the statements in appellant's brief to the effect that at the time of West's settlement there was nothing of record in the Coeur d'Alene Land Office or in the General Land Office at Washington disclosing the Railway Company's rights under its selection, are quite without justification—and are, of course, contrary to the fact. Certainly the testimony of the witness Davegio (Record, pp. 31-33) does not support this conclusion.

Under the established practice of the Land Department (which we understand this court judicially notices) such selection lists have always been filed in

duplicate or triplicate, one copy being kept on file in the local land office and another being transmitted to the General Land Office at Washington; and the selection is noted on the tract books and records in the local land office and in the General Land Office. See departmental opinion in *Daniels vs. Northern Pacific*, printed as an appendix to the brief of Mr. Bunn and Mr. Donnelly. Now it must be presumed, at least in a case like this, where (as we shall hereafter show) all presumptions run in favor of the patent title, that the public officers duly performed their duty in these respects. But it is unnecessary to resort to this presumption, for the record carries affirmative contemporaneous proof on the point. The Company's selection list No. 61, introduced in evidence by the appellant, contains a certificate by the Register and Receiver under date of June 21, 1901, reciting that the list has been duly filed and that upon examination of the plats and records, it appears that the land is subject to selection, and declaring that: "We have therefore approved the foregoing list and selection of lands therein described and have *made due notation thereof upon the records of this office.*" (Record, pp. 48-53.) See also the express finding of the Commissioner in his decision of January 5, 1907. (Record, p. 63.)

Now the Railway Company had done all those things required of it by the law and the practice of the Department to fasten its claim upon the land. It had failed in nothing requisite to be done for its protection and to give notice of its claim. That claim, in all of its particulars, was matter of record in the Coeur d'Alene office and in the General Land Office at Washington, where proper inquiry at any time would have disclosed the facts. If the description, which was in terms of future survey, was not suffi-

ently specific to identify the particular land to the understanding of one examining the records on May 15, 1903, the date of West's settlement, it was made perfectly clear and definite by the survey in the field less than seven weeks later. And if it is true that West did not in fact learn of the Company's claim until he undertook to file his homestead application in July, 1905, it is also true that at that time he came into full knowledge, not only that the land was subject to the Company's claim but also that that claim was superior in law, as well as prior in point of time, to his settlement right; since his application was then rejected on the ground that the Railway selection was paramount. This was only two years after West's settlement and more than nine years ago; so that most of the time and practically all the work and money West has spent in his effort to acquire title, was spent with full knowledge of the nature and priority of the Company's rights.

This would be no reason for denying West the land if the Company's claim were really invalid, and it has no real bearing upon the questions of law which the court must decide. But the appeal to sympathy has been strongly made in the argument for appellant, and it is just as well the court should be apprised of the real situation. We agree with the trial judge that the claims of the pioneer settler always appeal strongly for sympathy, and we do not say that the present appellant is wholly without claim to sympathy of this sort. But his case is very different from that of the real homeseeker, who has proceeded in ignorance of an adverse title, and whose improvements and cultivation have given the land its chief value—the sort of case so common in the western prairie states a generation ago. The appellant played for the high stake of a valuable tract of timber, in a speculation which may have been legitimate, but which was conducted with open eyes.

And the charge that he was misled or deceived by the state of the records or by the form of description used in the selection list is wholly unjustified.

Argument.

I.

We have already said that we think the particular question to which Mr. Bunn and Mr. Donnelly address their brief is the pivotal point in the case, and that the learned District Judge was right in putting his decision upon that ground—as did the Secretary of the Interior in the case of *Daniels vs. Northern Pacific*. And we believe that that is the ground upon which this court can most appropriately base an affirmance of the decree appealed from. But there is another ground, not inconsistent with that, which would compel the same result, even if the Court were of a different mind than the Secretary and the court below with respect to the question deemed by them to be controlling. The proposition may be stated thus:

If it be conceded that the construction placed by the Department and the court below upon the act of 1899, with respect to the form of description to be employed and with respect to the necessity for marking boundaries and posting notices, was erroneous; nevertheless the Railway Company and its grantee are protected by the rule that where a party has proceeded, in the acquisition of rights under the public land law, in accordance with a practice established by the Department (whether such practice is founded upon formal regulation, decision, or customary usage), his rights cannot be affected by any change of rule, even though it be considered that the former practice was rooted in an incorrect construction of the law or in un-

sound views of administrative policy. The selection attacked in this case was made in exact compliance with the practice established by the Department shortly after the passage of the act in question, and steadfastly maintained and approved by it without change for many years thereafter; and rights founded thereon cannot now be defeated because it is conceived that the practice was wrong, even though the court should be of the opinion that the act was not rightly construed by the Department in the first instance.

The principle is most firmly established by the uniform current of decisions of the courts and the Department, that a rule of *practice or procedure*, whether based upon an express or formal regulation, or upon departmental rules or decisions, or upon established or customary practice, protects a claimant who has complied therewith, as against any subsequent abrogation of the rule; notwithstanding the rule itself may be based upon an erroneous construction of the law. And it is equally well established, as an outgrowth of this doctrine, that a rule or regulation governing practice or procedure in the Department will never be given retroactive effect to the prejudice of rights initiated under a former practice.

Turning first to the decisions of the Department, the leading case appears to be *Mary R. Leonard*, 9 L. D., 189. In that case a timber-culture claimant had made proof of entry and cultivation in compliance with the practice in force at the time of the entry; but by a decision subsequently rendered it was held that this practice was based upon an erroneous construction of the timber-culture law. The Department nevertheless held that the entryman was protected by compliance with the previous practice, even though erroneous, and Secretary Noble said:

“Under the latter, which it is not denied by the counsel for the petitioner, is the correct construction

of the law, the proof was insufficient. It is contended that inasmuch as the proof was in accordance with the law as construed when it was offered and accepted, that the subsequent change of construction should not be held to operate retroactively so as to invalidate it. In the case of *Miner v. Mariott*, 2 L. D., 709, it is said by this Department, that though 'a construction is clearly erroneous, such fact does not render illegal any acts which have been performed in accordance with and pursuant to that construction or interpretation.' * * * In its practical administration, the law must be held to be what for the time being it is construed to be by the tribunals lawfully constituted for that purpose. This course is not only dictated by the necessity of the case, but is in accordance with reason and justice. To give a retroactive effect to a change of construction by a court or other tribunal, so as to render illegal acts which have been performed with trouble and expense in accordance with and on the faith of the former construction would seem to be as 'unjust as to hold that rights acquired under a statute may be lost by its repeal,' and as objectionable as the enactment by legislative bodies of retrospective laws, which 'are generally unjust and to a certain extent forbidden by that article in the Constitution of the United States which prohibits the passage of *ex post facto* laws or laws impairing contracts.' All that can be required of the citizen by any just government is that he conform to the law as at the time expounded by its courts or other tribunals invested by it with such authority."

Miner v. Mariott, 2 L. D., 709, cited in the *Leonard* case, is another leading authority. In that case it was held that a previous practice of the Department (not based upon specific regulations, but upon custom and rulings) with respect to the time within which an adverse claim might be filed, was erroneous, being founded upon a wrong construction of the statute. But the Secretary held that the claimant was protected by his compliance with the practice previously sanctioned, saying:

"The rule of this decision should not operate to interfere with or take away any rights acquired under the law as it has heretofore been construed by your office. *Though that construction is, in my opinion, clearly erroneous, such fact does not render illegal any acts which have been performed in accordance with and pursuant to that construction or interpretation. Until a rule is changed it has all the force of law, and acts done under it while it is in force must be regarded as legal.*"

In Henry W. Fuss, 5 L. D., 167, cited in the Leonard case, assignments of desert-land entries made while a rule allowing the same was in force were recognized, notwithstanding that rule was founded upon what was afterwards held to be an erroneous interpretation of the statute. Secretary Lamar said:

"Although it is silent on this question, I think a reasonable construction of the act as a whole, its purpose and intent being considered, warrants the rule against assignment; but being a matter of construction, or more correctly speaking of administrative policy, and a question which has been involved in some doubt, as would appear from the fact that the rule has been changed, *the regulation of your office which recognized the right of assignment had, until revoked or overruled, the force and effect of law, so that rights acquired and valid thereunder should be protected (citing authorities).*"

In Cudney v. Flannery, 1 L. D., 165, Secretary Teller said:

"The regulations and rules of your office and of this Department in force at the date of Flannery's entry have the force of law as respected a tract subject to entry. There was then no objection to such an entry, and Flannery's was allowed as legal and made in accordance with what was considered a correct interpretation of the statute. *He thereby acquired rights which cannot now legally or equitably be repudiated*

** * * even though such an entry might not now be allowed. The latter rulings cannot have this retro-active effect."*

In David B. Dole, 3 L. D., 214, Secretary Teller said:

"Although I find nothing in the act to warrant so broad a construction of its provisions * * * yet these instructions had the force of law, and parties had the right to assume that this was the legal construction of the act, and that assignees of such entries would be protected in their purchases, and have the rights of entrymen. I think it immaterial that the construction was erroneous and unwarranted, so long as it was the official announcement of the law by the Land Department. * * * I do not understand that a party acts under a misapprehension of the law, so as to lose any right, when he acts under its official interpretation. The misapprehension in such a case is upon the part of the interpreting authority, and not upon him who in the prosecution of a claim conforms to such interpretation. A different rule would permit every person to construe the law for himself; and hence, your office being a proper exponent of this law, entrymen and their assignees acting under such exposition should not be required to forfeit any right by subsequent construction inconsistent with the first."

The instructions of July 16, 1889, 9 L. D., 86, contain the following language:

"But if the entry was made under rulings of the Department in force when the application was made, that ruling should be allowed to stand and control the case. Until a rule is changed it has all the force of law and acts done under it while it is in force must be regarded as legal. * * * It seems to me that, inasmuch as the Department from the time of the passage of the bill up to the circular of the date of June 27, 1887, erroneously construed the true spirit and intent of the act, and in pursuance thereof numerous entries have been made under the law as thus

promulgated, amounting to some 2,500 or more, that such entries should be protected under the construction thus given the act, giving such construction all the force and effect of law. Were it not so, great wrong and inconvenience would result. In this character of entries it has been repeatedly held that, if the entry is made under rulings of this Department in force when the application is made, it should be allowed to stand. Until a rule is changed it has all the force of law and acts done under it while it is in force must be regarded as legal (citing authorities)."

The same doctrine has been applied, in varying language and under various sets of circumstances, in a great number of departmental decisions, among which are the following:

Milne v. Ellsworth, 3 L. D., 213,
 Isham Floyd, 5 L. D., 531,
 James Spencer, 6 L. D., 217,
 Candido v. Fargo, 7 L. D., 75,
 C. P. Masterson, on review, 7 L. D., 577,
 William Thompson, 8 L. D., 104,
 John M. Lindback, 9 L. D., 284,
 J. H. Kopperud, 10 L. D., 93,
 Jacob Oswald, 11 L. D., 155,
 James Lee Lode v. Little Forepaugh Lode, 11 L. D.,
 391,
 Oro Placer Claim, 11 L. D., 457,
 Edwin F. Frost, 21 L. D., 38,
 Tustin v. Adams, 22 L. D., 266, 270,
 Ella I. Dickey, 22 L. D., 351,
 State of California, 22 L. D., 428,
 Kirk v. Brooks, 24 L. D., 448,
 Labathe v. Robords, 25 L. D., 207.

The latest word of the Department on the subject is found in a recent decision of the present administration; Rough Rider and Other Lode Mining Claims, 42 L. D., 584. This case was before the Department on petition for the

revocation of prior decisions cancelling certain mineral entries, on the ground that such entries should be deemed protected by the fact that they were made in accordance with a rule in force at the time they were made; which, however, was afterwards declared to be erroneous and abrogated by the Department. The decisions were revoked and the entries allowed. It was said:

"There can be no question therefore that at those times a more liberal rule with reference to mining locations situated in this region prevailed in the land department than that applied by the Department with respect to the claims here in question in its decision of January 31, 1911, and that had said earlier rule been followed with regard to these locations they would, in the absence of other objections, have been passed to patent. This being true, and it appearing that these locations and others in that vicinity, based on the same character of discovery, had been, in reliance on such rule, purchased and dealt with as property, the Department is now of opinion that the rule under which the entries were canceled should not have been given retroactive application to the prejudice of the owners of the claims, but, on the other hand, that the said previous and long-continued practice of the land department *established a rule of property* with respect to such claims which should have been adhered to and followed in the determination of this case. *Germania Iron Company v. James et al.*, 89 Fed. 811; *James et al. v. Germania Iron Company*, *Belden v. Midway Company*, 107 Fed. 597; *Howe et al v. Parker*, 190 Fed. 738; *Henry W. Fuss*, 5 L. D., 167; *William Thompson*, 8 L. D., 104; *William Drew*, 8 L. D., 399; *French Lode*, 22 L. D., 675; *Gowdy et al. v. Kismet Gold Mining Company*, 24 L. D., 191; *Brick Pomeroy Mill Site*, 34 L. D., 320; *Hidden Treasure Consolidated Quartz Mine*, 35 L. D., 485."

The authorities thus far cited are drawn from the published decisions of the Department. But we may draw still stronger support from the decisions of the courts.

We turn first to the great leading case of *United States v. MacDaniel*, 7 Pet., 1, 14. That case arose upon an attempt to recover from a clerk in the Navy Department special allowances paid him under a practice or usage in force in the Department, which was afterwards abrogated. There was no specific rule, regulation or decision sanctioning such payments—the matter was merely one of customary usage and practice in the Department. It was admitted that there was no statutory authority for such payments. The Supreme Court held the new ruling valid and effective as applied to subsequent transactions, but also held that although this new ruling might be based upon a true construction of the law, and might properly have been applied in the first instance, yet it could not be given a retroactive effect in derogation of past transactions founded upon a construction theretofore given the law by the Department, as established by its previous usage and practice; and the judgment of the court denied recovery of the sums paid. In this connection the court said:

“A practical knowledge of the action of any one of the great departments of the Government must convince every person that the head of any department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. * * * Hence, of necessity, *usages have been established in every department of the Government, which have become a kind of common law*, and regulate the rights and duties of those who act within their respective limits. *And no change of such usages can have a retrospective effect, but must be limited to the future.* Usage cannot alter the law, but it is evidence of the

construction given to it, and must be considered binding on past transactions."

Perhaps the most interesting discussion of the question involved in the present cases is found in the decisions of the Circuit Court of Appeals for the Eighth Circuit in *Germania Iron Co. v. James*, 89 Fed., 811, and *James v. Germania Iron Co.*, 107 Fed., 597; successive appeals in the same case, which was a suit in equity by an unsuccessful contestant before the Department to have his successful adversary declared to hold the patent title as trustee for the complainant on the ground that the decision of the Secretary awarding patent to the defendant was erroneous in law. In the first case (*Germania Iron Co. v. James*, 89 Fed., 811) Judge Sanborn said:

The Secretary of the Interior held * * * five years afterwards, that a prior application to enter the land, made * * * in violation of the rule and practice of the Department, was superior in right to that of the first applicant after the receipt of the decision. * * * This ruling was clearly an error in law, and it entitles the appellant to the relief it seeks. * * * *The reasonable and established rules and practice of judicial tribunals become as much a part of the law of the land as the statutes under which they act. * * * Moreover, the rule and practice here under consideration stand upon far higher ground than the ordinary rules for the mere conduct of proceedings in courts. They condition the inception, the foundation, the very existence, of all rights and title to this land. Rights initiated in accordance with them became vested interests in property, and attempts to establish rights in violation of them were as though they had not been. They had become an established rule of property, upon which men relied and had the right to rely. The maxim, 'Stare decisis, et non quieta morere,' applies nowhere more universally, or with more salutary effect, than to those rules and that practice under which property*

is acquired or secured. *It is often far more important that these should be certain and changeless than that they should be right.* Men engage in business occupations, buy, sell, and contract, in reliance upon them. Lawyers advise their clients and enforce and protect their rights with constant reference to them, and while all interests will readily adjust themselves to, and protect themselves under, erroneous rules, there is neither protection nor safety for any interest under shifting rules. * * * *Nor was it within the supervisory power of the Secretary or of the Commissioner to set aside or annul rights acquired under this rule and practice, or to deprive Hartman of his title to this land, by a retroactive decision, made five years after his right to it had vested, to the effect that the established rule or practice when he made his entry was either inconvenient or erroneous.* They might undoubtedly have made and promulgated a new rule which would have governed cases arising after a new rule of practice had been made and had become known, but Hartman and the other applicants * * * *had the right to the determination of their claims according to the practice as it then existed. Retroactive decisions of judicial tribunals are as vicious and ineffectual as retroactive laws* (citing authorities). * * * System, order, and the uniform application of the laws, the rules, and the practice to all litigants alike, are as essential to the administration of justice in the Land Department as in the courts. * * * What a farce the attempt to secure rights in any judicial tribunal must become, if its rule and practice are ignored or applied at the arbitrary will of the judge who presides over the court! Under such an administration of the Land Department, the rights and titles which the law attempts to protect and secure would become naught but privileges dependent upon the gracious favor of its officers. The power to degrade them to this rank cannot be found in the supervisory authority of the Secretary or of the Commissioner."

On the second appeal (James v. Germania Iron Co., 107 Fed., 597) Judge Sanborn said:

"The rights of these parties vested on February 23, 1889. They were initiated under and conditioned by the laws of the land *and the rules and practice of the Department on that day, and no subsequent rules, decisions, or practice could divest them of the property they then secured, or deprive them of their equitable or legal rights to the title to the land which they then acquired.* Cornelius v. Kessel, 128 U. S., 456; Shreve v. Cheesman, 69 Fed., 785. For this reason the *subsequent* practice and decisions of the Department, which have been carefully considered, will not be reviewed at length in this opinion, but will be here laid aside with the remark that they are without legal effect upon the issues in this case. * * * Even if the opinions cited against it had decided that the rule was abrogated or limited, they would have been nothing more than erroneous judgments. They could not have affected the rule. * * * Nothing short of an express and formal repeal or abrogation of the rule and public notice thereof by the Secretary, who alone had the power to establish and overthrow rules, could have destroyed its force or limited its terms. * * * Hartman had the right to rely upon this rule and practice, and to secure this land in accordance with it."

In *Howe vs. Parker*, 190 Fed., 738, 757, Judge Sanborn, speaking for the Court of Appeals, said:

"The settled rules and practice and the uniform decisions of the department constitute both rules of law and of property, and equitable titles in entrymen cannot be destroyed by the Land Department in violation of them. System, order, and the uniform application of the established rules and practice of the Department to all litigants alike are as essential to the administration of justice in the Land Department as in the courts. What a farce the attempt to secure or protect rights in any judicial or quasi judicial tribunal must become if its rules and decisions are ignored or applied to each case as it arises at the arbitrary will of the officer who presides. Equitable titles

of claimants to lands under the acts of Congress may not be annulled by the Land Department in violation of its settled practice, or of a rule of law and of property established by a long line of decisions of its officers, nor without legal notice to the parties in interest and an opportunity to be heard."

We come now to a series of cases which cite and apply the doctrine of *United States v. MacDaniel*, *supra*, under conditions which made the question at issue similar to the question involved in the present case. And we may pause here to remark that we know of no instance in which the principle of the *MacDaniel* case has been questioned or its authority doubted. One of the earliest applications of the rule laid down in the *MacDaniel* case was in *United States v. Buchanan*, Fed. Cas. No. 14678, where the court said:

"When the usage is established it regulates the rights and duties of those who act within its limits (citing United States v. MacDaniel, supra). But it is said that a different construction was given to these regulations by Mr. Secretary Paulding, and that he confirmed the views of Commodore Claxton. If the order of Commodore Claxton had been confined to supplies purchased subsequently to the receipt by him of this general order, there might have been force in this argument; but no change of usage, even by authority, can have a retrospective effect, and must be limited to the future."

Rand v. United States, 38 Fed., 665, is a case which applied the doctrine of *United States v. MacDaniel* to the question whether certain officers of the Treasury Department were entitled to fees for certain services. There was no statutory authorization for such charges, but the previous usage of the Department permitted them.

A somewhat similar application of the rule was made in *Walker v. United States*, 139 Fed., 409, 416, where the

language we have excerpted from the MacDaniel case was approved and applied.

United States v. Alabama, etc., Railroad Co., 142 U. S., 615, 621, is another well-known authority, in which the MacDaniel case is cited and approved. In that case Mr. Justice Brown said:

“We think the contemporaneous construction thus given by the executive department of the Government and continued for nine years through six different administrations of that department * * * should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced. *It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive.*”

In the very recent case of United States v. Newport News, etc., Co., 178 Fed., 194, the Court of Appeals of the Fourth Circuit applied the doctrine of the MacDaniel case to the construction of a contract between the Government and a shipbuilding company, holding the latter protected by customary practice in previous transactions. The court quoted from the MacDaniel case the language excerpted on a preceeding page, and upon that authority held that the course of customary practice in previous transactions between the Government and its contractors must be deemed to have established a rule in the light of which the contract should be construed; so that a different requirement, although supported by the terms of the contract itself, would be equivalent to a retroactive change in

established usage which could not be made to the prejudice of rights already initiated, under the principle established by the MacDaniel case.

And as lately as *Haas v. Henkel*, 216 U. S., 462, 480, the Supreme Court has quoted with approval the language of *United States v. MacDaniel* to which such frequent reference has already been made.

In *State v. Kelsey*, 44 N. J. L., 1, 22, the New Jersey court quoted with approval the following language of the Supreme Court of Massachusetts in *Rogers v. Godwin*, 2 Mass., 477:

"And although if it were now *res integra* it might be very difficult to maintain such construction, yet at this day the *argumentum ab inconvenienti* applies with great weight. We cannot shake a principle which in practice has so long and extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is now supported is, that long-continued usage furnishes a contemporaneous construction which must prevail over the mere technical import of the words."

In *Stuart v. Laird*, 1 Cranch, 299 the Supreme Court said:

"To this objection, which is of recent date, it is sufficient to observe that *practice and acquiescence* under it for a period of several years * * * affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled."

In *Commonwealth v. Gregory*, 89 S. W. Rep., 168, the Court of Appeals of Kentucky quoted with approval the language of an earlier Kentucky case (*Harrison v. Commonwealth*, 83 Ky, 162), where it was said:

"The executive branch of a government must neces-

sarily give a construction to the laws which it must execute; and, if its construction has been followed for years, and in view of and without interference by the law-making power, then such contemporaneous and long-continued construction should not be departed from without the most cogent reasons. *A long-continued practice* under a statute, under such circumstances, ripens into an authoritative construction of it."

And finally in *United States v. Hammers*, 221 U. S., 220, which involved the question of the assignability of desert land entries, the Supreme Court said:

"We do not find the act of 1891 as clear as the learned District Court did, and must give to decisions of the Land Department the weight to which in such case, the court acknowledged, they are entitled. * * * To support and give force to a practice of the Land Department under the act of 1891, to impugn its construction of the act, is certainly confusing. We cannot assume that the Land Department did not know what it was about and made its practice under the act oppose its construction of the act. * * * Conceding then that the statute is ambiguous, we must turn as a help to its meaning, indeed in such case, as determining its meaning, to the *practice* of the officers whose duty it was to construe and administer it. They may have been consulted as to its provisions, may have suggested them, indeed have written them. *At any rate their practice, almost coincident with its enactment, and the rights which have been acquired under the practice, make it determinately persuasive.*"

While as lately as in *Roughton v. Knight*, 219 U. S., 537, 546, it was said of the Forest Reserve lieu selection act of June 4, 1897, and of the necessity for and propriety of regulations prescribing the *manner* in which selections shall be made:

"But the act *did not prescribe the method* by which

one so situated might avail himself of the proposal. It was therefore competent for the Land Department to adopt rules and regulations for the administration of the act in this particular."

There is no room for distinction, with respect to the application of the principle declared in the authorities cited, between cases where the rule of practice or procedure which was held to protect a claimant who had complied therewith, was a rule established by express regulation, circular or instruction, or by departmental ruling or decision, and cases of a rule not founded upon express regulation or decision, but built up by custom, usage or practice. Many of the cases cited above are of the latter character, as will appear from the language we have quoted. This is especially true of some of the most important of them; notably *United States v. MacDaniel*, 7 Pet. 1, which is the leading case in the courts; of *Miner v. Marriott*, 2 L. D., 709, which is one of the leading cases in the Department; and of *Rough Rider and Other Lode Mining Claims*, 42 L. D., 584, which carries the latest expression of the Department on this subject. Of the same character are the following, from which no quotation has yet been made:

"Whenever an act of Congress has by actual decision or *by continued usage and practice* received a construction of the proper department, and that construction has been acted upon for a succession of years, it must be a strong and palpable case of error and injustice to justify a change in the interpretation to be given it (2 Op., 558; 10 Ib., 52). 'When there is ambiguity or doubt in the construction of a statute, a long-continued construction of it in practice in a department would be in the highest degree persuasive, if

not absolutely controlling, in its effect.' *United States v. Graham* (110 U. S., 219)."

Isham Floyd, 5 L. D., 531.

*"I am unable to find that the Land Department has in any case directly announced the principle that coal-land entries may be made of non-contiguous subdivisions; but it seems to be a fact that such was the practice of your office, and that in many instances entries consisting of non-contiguous subdivisions have been allowed to pass to patent. It is evident that such action was not inadvertence, but an erroneous construction of the law. The entry in the present case was allowed under the practice then prevailing in your office. It has been held by the Department that where a decision operates to change a practice or rule well established, especially if it be upon a point of interpretation not without difficulty, the action already taken by private parties in good faith under the prevailing practice may be sustained in proper cases; and although such construction may have been erroneous, it does not follow that any acts which have been performed in pursuance of or in accordance with such construction or interpretation, are necessarily illegal (citing *Miner v. Mariott* and other authorities)."*

C. P. Masterson, on review, 7 L. D., 577.

And in *Haas v. Henkel*, 166 Fed. 621, 627, it was said:

*"Such regulations, as held in *United States v. MacDaniel*, 7 Pet. 14, need not be in the form of writing, but may consist of established usages and practices, which have become a kind of a common law of the Department."*

Let us emphasize the fact that the question is not one having to do with substantive rights under the statute. It is not a question of who can take under the act, or of

what land may be taken, or of the extent or character of the appropriation. It is merely a question of *procedure*—of what steps must be taken in order to perfect the right granted. The Department, construing the statute, pointed out the steps to be taken. The Railway Company followed the line thus marked out, faithfully and with exactness. The rights of the respondent Timber Company were acquired on the faith of the regularity of the Railway Company's procedure, in the light of the departmental sanction given it. No one was misled or prejudiced by the fact that the Railway Company pursued the approved practice instead of adopting a different method. The Railway Company could just as well and just as easily have taken another course, and would have done so if the Department had so directed. And it cannot be pretended that appellant's position would be any different or better if the Department had construed the act differently and had required a different course of procedure. Certainly he would not have been benefited if the selection list had described the land by metes and bounds, or in some other manner, since his evidence is to the effect that he made no inquiry at or examination of the records of the local land office and was unaware that any selection list had been filed; so, as the learned District Judge points out, he "had no knowledge of the existence of the list, and therefore, whatever may have been the form of description, it could not have influenced his action." (Record p. 86.)

2.

Now there is no question as to what the established practice in the Land Department has been with respect to selections under the act of 1899. In the brief of Mr. Bunn and

Mr. Donnelly will be found an explanation of the development of the practice of describing unsurveyed lands in terms of future survey in selections under the acts of June 4, 1897, July 1, 1898 and March 2, 1899.

The first formal regulations on this subject adopted by the Department were those applicable to the act of July 1, 1898, which were promulgated February 14, 1899. The next to be adopted were the regulations of May 9, 1899, controlling selections under the act of June 4, 1897. Extracts from these regulations will be found on pages 5 and 6 of the brief of Mr. Bunn and Mr. Donnelly. As explained in that brief, it was not until sometime after the acceptance by the Secretary of the Company's relinquishment of the base lands in the Mount Ranier National Park and the adjacent forest reserve, which was made on July 26, 1899, that the Railway Company was in position to make selections under the act of 1899. Not until after that date, therefore, was there any occasion to consider the practice to be pursued in making selections under the act.

When that time arrived the regulations of February 14, 1899, under the act of 1898, and the regulations of May 9, 1899, under the act of June 4, 1897—which contained practically identical provisions with respect to the selection of unsurveyed land—were in force and were believed to work satisfactorily.. It was, therefore, most natural and proper that the rules prescribed for selections of unsurveyed land under the acts of 1897 and 1898 should be applied to selections under the act of 1899, which also permitted the selection of unsurveyed land. And this was done.

The acts of 1897 and 1898 were of general application—the act of 1898 provides primarily for relinquishment and lieu selection by persons claiming adversely to the Railway Company—and the practice and procedure under those acts being matters in which the general public was therefore interested, there was good reason for the adoption

and publication of formal regulations thereunder. But under the act of 1899 the Railway Company was the only party necessary to be considered, since the right of exchange given to settlers in the Mount Ranier reservation was expressly made subject to the provisions of the act of 1897, and hence would be governed directly by the regulations adopted under that act. And the relinquishment of the base lands had already been made and accepted; so that the only matter for regulation was the form of selection lists to be filed by the company, and the mode of filing them. It followed that the Department deemed it unnecessary to promulgate formal regulations under the act of 1899; but it was instead informally directed that the Railway Company's selections should be made in the form and manner prescribed for selections under the act of 1898.

The practice thus established was continued in force, unmodified and unquestioned, for upwards of ten years. Nor was it a practice existing in mere casual, desultory and occasional filings. From the beginning—from within a few days of the Department's acceptance of the relinquishment of the Mt. Ranier lands—the selections under the act of 1899 came thick and fast. Questions upon such selections began to come before the Department for decision early in 1900, if not in 1899. The much cited case of *Clarke v. Northern Pacific*, 30 L. D. 145, was decided July 13, 1900, on appeal from the Commissioner's decision of September 30, 1899. The cases before the Department and the General Land Office involving selections under the act of 1899 have been very numerous indeed; and they were more numerous in the early days of the act than at a later period. And in every case, from the very beginning, precisely the same form of selection list was used, and precisely the same procedure followed with respect to the original selection, as in the cases at bar. It would be difficult to instance a practice more firmly established by usage and Departmental sanction. And, as we have shown, a practice

founded on usage or permissive sanction is just as sacred, and just as much the law of the Department, as one based upon positive regulation.

As long ago as in *Ferguson v. Northern Pacific*, 33 L. D. 634, an important and carefully considered case involving a selection made in precisely the same manner, by a selection list carrying precisely the same form of description as that involved in the case at bar, Secretary Hitchcock said:

“By the terms of the act the company was authorized to select lands either surveyed or unsurveyed, the *only requirement* with regard to the selection of unsurveyed lands being that found in the fourth section of the act which provides that—‘In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office *shall describe such tract in such manner as to designate the same with a reasonable degree of certainty*; and, within the period of three months after the lands including such tract shall have been surveyed and the plat thereof filed in said local land office, a new selection list shall be filed by said company, describing such tract according to such survey.’ *With this condition the company has complied as hereinbefore shown.*”

3.

Now, as pointed out by the Secretary in *Ferguson vs. Northern Pacific*, the “only requirement” imposed upon the Railway Company with respect to the original selection of unsurveyed land, is that it shall file in the local land office a selection list describing the lands selected. There is nothing in the act which requires notices to be posted or the boundaries of the selected tract to be

marked out on the ground, and it is not permissible to read such conditions into the statute. The act expressly declares just what the Company must do to acquire title, and provides that when those things are done and the selection has been approved, the Company shall be entitled to patent. Section 4 of the act provides that "upon the filing by the said Railroad Company at the local land office" of the list prescribed by the act, and payment of the fees required by law, and upon approval of the selection by the Secretary of the Interior, the Company shall receive a patent for the land; with the further provision that if the land is unsurveyed at the time of selection the Company shall within three months after survey file a new list redescribing the land according to the survey.

Under the doctrine of *Williamson v. United States*, 207 U. S. 425, 461, these explicit provisions foreclosed the imposition of further requirements by the Department. The provision as to the form of selection list and the manner in which selected lands shall be described is undoubtedly open to construction. But the declaration that upon filing of the prescribed lists and payment of the fees required by law the Company shall be entitled to patent, is too plain and explicit to leave room for the imposition of additional requirements. Under the rule of the *Williamson* case it was the duty of the Department to give full effect to the right to select unsurveyed lands granted by the express terms of the act, and it was not within its power to limit or restrict the enjoyment of the privilege thus conferred by imposing conditions and requirements not authorized by the terms of the act.

But the Department made no attempt to impose such conditions—or at least it made no such attempt until years after these selections were made. Hence it is enough to say that the act itself contains no requirement for the posting of notices or the marking of boundaries; nor language which could possibly be construed to contemplate or re-

quire any action of that sort. Granting that if the act contained any general provision for notice, this might be construed to require the marking of boundaries and the posting of notice where the selected land was unsurveyed at the time of selection; there is in the act no provision which calls for any notice of selection except that given by the filing of the selection list. This is pointed out in the decision in *Daniels vs. Northern Pacific*, to which reference has already been made. As the law itself contains no such condition, it was certainly not incumbent upon the Railway Company to take the steps indicated unless required to do so by some affirmative ruling of the Department. And no such ruling was made. As explained on pages 6 and 7 of the brief of Mr. Bunn and Mr. Donnelly, no attempt was ever made to provide for posting notice until the regulation of February 21, 1908, which became effective April 1, 1908; nor to provide for description by metes and bounds, or for the marking of boundaries, until the regulation of November 3, 1909; and it has been held that neither of these regulations was intended to have, or can lawfully be given, a retroactive operation. And this is aside from the question whether those requirements are valid even as to future selections, as against the rule of the *Williamson* case.

4.

The point that the description employed in the Company's selection list was sufficient to satisfy the requirement of the act that the list "shall describe the land so as to designate the same with a reasonable degree of certainty," is very well covered in the brief of Mr. Bunn and Mr. Donnelly; but there are one or two phases of the question which may bear elaboration.

Appellant's counsel insist that there is great significance in the difference between the language of the act of 1899 and that of the act of 1898. Their theory is that since the act of 1898 expressly permits selections of unsurveyed land by the description by which the land will be known when surveyed, the absence of similar language in the act of 1899 evinces an intention on the part of Congress to prohibit that form of description and to require the kind of description which counsel advocate. In addition to what is said in the opinion of the court below and in the brief of our associates by way of answer to this argument, we venture the following suggestions:

The act of 1898 confined the Company's selections of unsurveyed land to odd-numbered sections. This made it necessary for the Company to determine, in advance of selection, whether the land desired would, upon survey, fall within an odd-numbered section; and consequently made it necessary to determine in advance what the survey would be and to make selection with reference to such future survey. Therefore Congress might well provide in the act of 1898, that selections under that act must be made by the description by which the land would be known when surveyed, and make that method of description exclusive.

But the act of 1899 was not so limited. Under that act selections might be made in both odd and even numbered sections; and it was thus possible for the Company to make its selections in larger tracts and in solid bodies, without reference to section lines; and therefore in districts deeper in the wilderness than would be practicable under the act of 1898, where it was necessary to tie the selections to established survey lines. This called for more latitude with respect to description; since, to obtain full advantage of the right of selection granted by the act, it might be necessary to describe the selected lands without reference to future surveys. And we submit that, fairly considered, the provisions of the act of 1899 with respect to the description

of unsurveyed lands, are broader, more liberal and more elastic than those of the act of 1898; instead of being more narrow and restricted, as counsel argue.

The language of the act of 1899 may indicate that Congress assumed that under some circumstances it might be necessary to describe selected lands in some manner other than by reference to future survey. But the fact that the act may be held to permit that sort of description does not mean that it can be construed to forbid a description according to survey.

Neither does the fact that provision is made for a case where the lands are not described according to survey, mean that the description by reference to survey cannot be allowed. Grant that the clause of Section 4 which provides that if it is found that the selected tract does not "precisely conform with the lines of the official survey, the Company may describe the tract anew so as to secure such conformity," contemplates a description other than one according to the survey to be made. Does it follow from this that Congress intended to prohibit every other sort of description? We submit that such would be a strained and tortured construction of the law.

Nor does it necessarily follow from the language referred to that a description with reference to the future survey was *not* the only form contemplated. There are many instances where a description in that form requires revision after the survey plat is filed. Take for instance the case of Section 6 in a given township. Before survey, and even after survey in the field but before approval of the official plat, one might well select the North half and the Southwest quarter by those descriptions. After survey the same lands would be described as Lots 1, 2, 3, 4, 5, 6 and 7, the S. $\frac{1}{2}$ of N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$. Or take the case of a section through which a stream flows or in which there is a small lake. Often it cannot be known in advance of survey whether the

Government surveyors will consider it necessary to "meander" the stream or lake. If meandered, the description of unsurveyed lands must be changed after survey so as to refer to the "lots" into which the surveyors divide the subdivisions contiguous to the stream or lake, by the numbers given them by the surveyors.

5.

What is a "reasonable degree of certainty" within the meaning of the statute? Can it be said that the form of description which the Department for ten years held, and still holds (as witness the decision in *Daniels vs. Northern Pacific*), to be proper and sufficient—which it even made obligatory and exclusive—is so indefinite and uncertain that it does not come within the terms "reasonable degree of certainty"?

In *Balderston v. Brady*, 107 Pac. 493, 498, the Supreme Court of Idaho said:

"The fact, however, that the land was not surveyed could make no difference *where the numbers of the sections were specifically given. The title to unsurveyed lands may be as readily conveyed as that to surveyed lands. It is a maxim of law that that is certain which is capable of being made certain. 'Id certum est, quod certum reddi potest.'* All that remained to be done in order to identify these lands on the ground was to have the survey extended over them. *The description in the grant was definite and certain.*"

But the act of 1899 requires only a "reasonable degree of certainty." The quoted words must be given some meaning. Fairly construed, they indicate an intent to allow considerable latitude in the matter of description. Else

why say "*reasonable degree*"? The form of description which appellants argue for in these cases calls for *absolute* certainty. Surely the words of the act are most elastic in their meaning and purpose.

It must be apparent that the provision that the selection list "shall describe the land in such manner as to designate the same with a reasonable degree of certainty" may be satisfied in several different ways. It might be satisfied, for instance, by a description based upon natural landmarks, water boundaries or artificial monuments, or a combination of these; or by a description tied in, by courses and distances, to the established corners of some completed survey. But this is not to say that a description by reference to the survey thereafter to be made does not conform to the requirement of a "reasonable degree of certainty."

Bear in mind that the question now to be determined is not whether the practice heretofore pursued is the best and wisest that could be devised, but whether it can possibly be held to be permitted by the terms of the act. If under any fair or reasonable interpretation of the statute the form of description sanctioned by the Department can be held to come within the term "reasonable degree of certainty," then the selections must be upheld. In short, the present question, viewed in the aspect most favorable to appellant, is merely whether the construction which the Department put upon the act in the beginning, and steadfastly pursued for so many years, is *possible or permissible* under the language employed by Congress. For when the Department has interpreted the law, and rights have been acquired on the faith of that interpretation, a reconsideration of the question is somewhat limited in its scope, and it is not enough that the later view may favor a practice

different from that formerly established, if the former practice is within any reasonable interpretation of the words of Congress.

Under well known rules the most liberal construction must be given to the language of the act, if liberality of construction is necessary to sustain a Departmental interpretation in pursuance of and upon the faith of which a party has proceeded and upon which his rights depend. But we submit that no such liberality of construction is necessary to sustain the selection in controversy—that it would take a harsh and strained construction, indeed, to overthrow the ruling, early made and long maintained, that a description by reference to future survey is sufficient to conform to the requirement of a reasonable degree of certainty.

6.

The argument for appellant and the language of the opinion in the now overruled and repudiated case of *F. A. Hyde et al.*, 40 L. D., 284, (which has been the sole support for appellant's position) are alike rooted in the idea that a settler on unsurveyed land has an inherent right to notice of any prior claim; so that any mode of procedure for the appropriation of unsurveyed land which does not carry provision for adequate notice to intending settlers who may go upon the land thereafter, is void as against such settlers.

It is somewhat difficult to trace the inception and growth of this idea. Certainly there is nothing in the act of May 14, 1880, to lend it support; nor in any other enactment of Congress that we are familiar with. As an idea upon which future legislation or future Departmental procedure

is to be shaped, it is all very well. It is eminently proper that every reasonable precaution should be taken to give notice of claims fastened upon the public land for the benefit of subsequent claimants, including intending settlers under the homestead law. And regulations aimed at securing reasonable notice of the selection of unsurveyed land, for the protection of possible settlers, are proper enough *when applied to future cases*. But these are considerations of administrative policy and procedure, which relate only to the future. The question now before us is one of construction of an act of Congress; and in the solution of such a question considerations like these have no place—or, at least, cannot be invoked to defeat rights acquired under a different interpretation of the law by an administration holding different views of administrative policy.

Now it is a cardinal rule of statutory construction that where the language of a statute is open to different interpretations, reference may be had to other legislation on similar subjects for the purpose of determining whether there exists a settled legislative policy which will shed light upon the meaning of language used in the act under consideration. (See 36 Cyc. 1146-1150, and cases there cited; *Siemens v. Sellers*, 123 U. S. 276, 285.)

Examination of other legislation makes it apparent that at and prior to the time the act of 1899 was passed it was the settled policy of Congress in dealing with unsurveyed lands (1) to deal with them by the description to be fastened upon them by survey; (2) to make no provision for particular notice of the appropriation of such lands for the benefit of possible intending settlers thereon; and (3) to make no provision for marking the boundaries of the tracts so granted or appropriated in advance of survey, either for the benefit of possible settlers or for any other purpose.

A familiar illustration of this policy of Congress is found in the numerous railroad and wagon road grants.

Most of these grants were made in advance of survey of a large portion of the lands granted; and most, if not all, made a grant *in praesenti* of the land which when surveyed would constitute the odd-numbered sections within a certain distance from the line of road. Yet it has never been doubted that such grants conveyed a title superior to any right which could be acquired by a claimant who settled on the land while still unsurveyed, but subsequent to the date when the grant became fixed by definite location of the road.

Another illustration is found in the grants of rights of way and station grounds to railroads, which become fixed by the filing of location maps with the Secretary of the Interior, and which take precedence over subsequent settlement claims, although there is no provision for notice to possible settlers. See *Stalker v. Oregon Short Line*, 225 U. S. 142.

Again in the act of July 1, 1898, passed barely eight months before the act of March 2, 1899, was adopted, Congress expressly provided that unsurveyed lands selected under that act should be described with reference to the survey thereafter to be made, without provision for notice to subsequent claimants or for the marking of boundaries.

Further evidence that it has not been the policy of Congress, in dealing with unsurveyed lands, to make provision for special notice to possible settlers who may go upon the land before survey, is found in the act of August 18, 1894. This act provides that upon application of the governor of a state for the survey of any unsurveyed township, which application is filed in the General Land Office in Washington and not in the local land office, all lands in the township shall be reserved and withdrawn from settlement or other appropriation, until the expiration of sixty days after the filing of the survey plat. Under this act an application for survey, properly made, is held to defeat every settlement claim thereafter initiated. Yet there is no pro-

vision for notice to possible settlers, except the requirement that notice of the application (which may embrace a score of scattered townships) must be published in some one newspaper. And the inadequacy of such a publication to convey actual notice to wilderness settlers is too apparent for argument. It is obviously less effective than the notice conveyed by a selection list filed in the local land office.

None of these acts carry any requirement that the boundaries of the lands granted or reserved should be marked out upon the ground, so as to give notice to intending settlers; nor has anything of the sort ever been considered necessary by the Department or the courts. We understand that the first requirement for the marking of boundaries on the ground ever imposed by the Department upon the selection of unsurveyed lands is found in the regulations of November 3, 1909.

Thus it appears that it has long been the policy of Congress to deal with unsurveyed lands by the description which will be given them by survey; and that grants by this form of description have always been held to confer rights superior to any which might be acquired by subsequent settlement under the act of May 14, 1880. And it appears that Congress has never considered it necessary or proper to make any provision for notice for the benefit of possible settlers before survey, of the rights passing under such grants. Nor has it ever been supposed that a settler under the act of May 14, 1880, acquires any rights against the prior grant because he is without notice of such grant. Yet it is argued that the Department should read into the act of 1899 a requirement for notice which Congress itself did not see fit to put there. What reason is there for this distinction? We submit that every element of notice to the settler is present in a selection made as these selections were made, which such a settler has or could obtain of

prior rights under the railroad, school land, and right of way grants, or under the act of August 18, 1894.

It is, of course, unnecessary to demonstrate, by argument or authority, that it is within the power of Congress to grant lands by reference to future survey, or to grant the right to select lands by that description, and to make the right of the grantee or selector superior to any claim which may be initiated after the date of the grant or selection.

Nor does the Constitution impose upon Congress the duty to make provision for adequate notice of such appropriation for the benefit of a claimant who might thereafter settle on the land. In matters of this sort the power of Congress is plenary, and its discretion uncontrolled. It may make such provision for notice as it sees fit, or it may make no provision for notice at all. The settler on unsurveyed land has no rights save those which Congress has conferred upon him; and he must take those rights as they are given, with whatever risks, uncertainties and conditions the enactments of Congress have left them under.

The question is not whether *title* to the land passes, as against the Government, until the survey is complete; but whether a right can be acquired by such selection which shall be superior to any right based upon a claim thereafter initiated.

7.

Counsel for appellant, on pages 7 and 8 of their brief, refer to the "Act of June 6, 1900" as being the act by which the right of a settler on unsurveyed land is fixed and defined; and build somewhat upon the theory that this legislation was enacted *after* the passage of the Act of March 2,

1899. Now, of course, the rights of settlers on unsurveyed land are defined by Section 3 of the act of May 14, 1880, (21 Stat. L. 141) which, except as explained below, has stood unchanged from the day of its enactment. This section, as it was originally framed, and as it stands today, is in the language quoted on page 7 of appellant's brief. The act of June 6, 1900, (31 Stat. L. 683) merely adds to the section a provision covering the case of a woman who settles while unmarried and then marries before final proof. The act of June 6, 1900, does not even re-enact the language of the original section. It runs as follows:

"That the third section of the act of Congress approved May 14, 1880, entitled 'An act for the relief of settlers on public lands' *be amended by adding thereto the following.*"

Obviously this does not give the provisions of the act of May 14, 1880, relating to settlement on unsurveyed land precedence, as a statute of later enactment, over the act of March 2, 1899—which is a theory counsel seems to have evolved from their erroneous idea that those provisions will be deemed to speak as of the date June 6, 1900.

In this connection (and on page 8 of their brief) counsel for appellant advance a theory which we think requires no notice, except in so far as it is accompanied by the statement that "this is now the rule of construction and interpretation adopted by the Honorable Secretary of the Interior and the Commissioner of the General Land Office in construing this very act, that is, the act of March 2, 1899"; citing the Commissioner's decision of March 5, 1913, in the case of *Carrie E. Shearer vs. Northern Pacific Railway Company and Edward Rutledge Timber Company*, Intervenor. We shall file in this court before the hearing a certified copy of the decision cited, and of the decision of the Secretary of the Interior on appeal in the same case. From these it will appear that Mrs. Shearer, the claimant, made settlement on the land in June, 1902, two years *before* the

selection thereof by the Railway Company, which was made on June 27, 1904. The question before the Department was merely the question of fact whether Mrs. Shearer's settlement was made at the date alleged and was thereafter maintained in good faith and in compliance with the requirements of the homestead law. The effect of the instruction of March 20, 1911, reported under the title of *Northern Pacific Railway Company vs. State of Idaho*, 39 L. D. 583, to which reference is made in the Commissioner's decision, will be apparent upon examination of that opinion. And it seems to us very clear, not only that these decisions have no tendency whatever to support the proposition to which they are cited, but that there is very little excuse for a reference to them as authority on that proposition.

In truth, we think that appellant's brief shows some tendency towards recklessness of statement here and there. After discussing the case of *F. A. Hyde et al*, 40 L. D. 284, counsel says:

"The fact is that both the Commissioner of the General Land Office and the Department of the Interior have, without exception, followed the construction contended for by appellant as to the act of March 2, 1899, and other kindred acts, in all matters pertaining to lieu selections, with the single exception of the decision in appellant's case."

Now, we are advised that in no case that has been decided either by the Commissioner of the General Land Office or by the Department of the Interior, has the doctrine of the Hyde decision or "the construction contended for by appellant as to the act of March 2, 1899," been recognized or applied. On the contrary, that "construction" and the rule put forward in the Hyde case were explicitly repudiated, and the Hyde case expressly overruled, by the Department in *Daniels vs. Northern Pacific*. Moreover *Hanson vs. Northern Pacific*, 38 L. D. 491 is flatly against

appellant's position. And before the decision in the Daniels case, the doctrine of the Hyde case had been qualified and cut down in various decisions of the Department, including the Secretary's decision of June 14, 1913, denying rehearing in the case of *State of Idaho vs. Northern Pacific*, and the decisions of June 13, 1914, in the cases of *Geo. A. McDonald vs. Northern Pacific*, which deals with a selection under the act of 1899, and *John Bartholomew vs. Northern Pacific*, involving a selection under the act of July 1, 1898. These decisions have not yet been reported, but certified copies will be filed in this court before the argument.

8.

It should be borne in mind that the question before the court in this case is not one which has to do with substantive rights granted by the law, but only with the course of *procedure* to be followed in perfecting rights so granted. The Department construed the statute to require and permit certain steps to be taken. Those steps were taken in good faith by the party claiming under the act, in exact accordance with the rules laid down by the Department, and in reliance upon the Departmental construction. No one has been misled or prejudiced. Under these circumstances we submit that it is not the duty of the court to resort to refinement of reasoning for the purpose of overthrowing that construction. After all the question at this late date is not what interpretation the Department ought to put upon the provisions of the act of 1899, if the question were now before it for the first time. The question is whether the construction which the Department did put upon the act in the very beginning, which it steadfastly adhered to in administrative procedure for more than ten

years, and which it still consistently adheres to, as a matter of construction, is so obviously unreasonable and so contrary to the terms and intent of the statute as to afford no protection to parties proceeding in reliance upon it. Unless the statute is so clear as to leave no doubt as to its meaning, and the interpretation thus placed upon it by the Department is plainly and palpably unreasonable, then that interpretation should not now be departed from to the prejudice of rights acquired upon the faith of it.

No rule is more firmly established than that which declares that when the intent of a statute is in any respect doubtful, the construction placed upon it by the Department in contemporary administration must be given great weight, and that when such construction has been continuously recognized and applied over a series of years it must be regarded as conclusive—even though such construction is of doubtful correctness if considered as an original proposition.

Louisiana v. Garfield, 211 U. S., 70.

United States v. Moore, 95 U. S., 760.

United States v. Burlington, etc., Railroad, 98 U. S., 334, 341.

Hastings, etc., Railroad v. Whitney, 132 U. S., 357, 366.

Heath v. Wallace, 138 U. S., 573, 582.

United States v. Alabama, etc., Railroad, 142 U. S. 615, 621.

Orchard v. Alexander, 157 U. S., 372, 383.

Hewitt v. Schultz, 180 U. S., 139, 156, 163.

United States v. Hammers, 221 U. S. 220, 228.

O'Connor v. Gertgens, 85 Minn., 481, 496.

Johnson v. Fleutsch, 176 Mo., 452; 75 S. W. Rep., 1006.

Another well settled rule, applicable in this connection,

is that the general law commits to the Department the authority to prescribe regulations governing procedure for the appropriation of public lands under the various acts of Congress, although there may be no express delegation of that authority in the particular act. When Congress, in the act of 1899, provided that selected lands should be described "with a reasonable degree of certainty," it committed to the Department the duty and authority to determine what form of description should constitute a reasonable degree of certainty. And when the Department, in the exercise of the discretion thus confided to it, ruled that a description by reference to the future survey was sufficient under the act, and was the best and most practical form of description, it established a rule of property which should not now be overthrown.

Furthermore it is familiar doctrine that while respect is always given to the construction put upon a statute by the Department charged with its administration, even where that construction deals with matters of substantive right, still greater weight is given to the departmental construction of those provisions of the statute having to do with *procedure thereunder*.

This, of course, is independent of the rule discussed in an earlier section of the brief to the effect that a party is protected by the rulings of the Department in matters of procedure, however erroneous such rulings may be in the eye of the law, where he has in good faith proceeded in accordance with the rules thus laid down. That principle of law protects a claimant against the retroactive operation of a change of view, whether that change consists in new regulations or in an altered construction of prior statutes; and in those cases it is not material that the former pro-

cedure was based upon a view of the law so plainly erroneous that it cannot be permitted to control future transactions. The rule immediately under consideration is one which forbids the overthrow of the settled departmental construction—which recognizes that such construction has established a rule of property not to be overturned—unless the intent of the statute is clear and free from doubt and the error of the former construction is perfectly plain and palpable.

9.

The argument that the act of 1899 was a *grant*, and as such should be strictly construed against the Railway Company, is well answered in the brief of Mr. Bunn and Mr. Donnelly, as well as by the Court below in its quotation from the opinion in *State of Idaho v. Northern Pacific*, 37 L. D. 135, 138, where the Secretary said:

“The act is contractual in character and terms, and conditions not clearly expressed are not to be lightly imposed after acceptance of the offer. This is especially true where this amounts to a limitation upon the enjoyment of the right by the party as to whom the contract still remains executory. In the opinion of the Department every element of a contract is present in the act of March 2, 1899.”

But even if the act were a “grant,” as counsel understands that term—that is, if it were of such a character that it should be construed by the same rules as the original grant to the Northern Pacific—nevertheless it does not follow that an especially strict construction should be applied. The latest expression of the Supreme Court of the United States on this subject is found in *Burke v. Southern*

Pacific, 234 U. S. 669, 679, where Mr. Justice Van Devanter says of a grant similar to the original Northern Pacific grant:

"We first notice a contention advanced on the part of the mineral claimants, to the effect that the grant to the railroad company was merely a gift from the United States, and should be construed and applied accordingly. The granting act not only does not support the contention but refutes it. The act did not follow the building of the road but preceded it. Instead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right and title to the public lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the Government and the public, and to that end provision was made for compensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties *were brought into such contractual relations that the terms of the proposal became obligatory on both*. *Menotti v. Dillon*, 167 U. S. 703, 721. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the Government. In other words, *it earned the right to the lands described*. Of course, any ambiguity or uncertainty in the terms employed should be resolved in favor of the Government, but the grant *should not be treated as a mere gift*."

In the Court below counsel argued that the land in suit was not subject to selection under the act of 1899 because, as counsel asserted, it was not "classified as non-mineral at the time of actual government survey" within the intent of the act, and that the Northern Pacific Railway Company was not entitled to make selections under the act as the successor in interest of the Northern Pacific Railroad Company. These propositions, although made the basis for assignments of error, have been abandoned by appellant; the first altogether, and the second except as it is used as a makeweight in the argument of another question; so that it would seem that we are relieved from the necessity for discussing either of them. But a sufficient answer to them lies in certain rules of law which should be held in mind in considering other questions in the case, and it may be well to dispose of them finally by reference to those rules.

These are the rules which must govern the courts in the consideration of suits attacking a patent title. So far as material in the case at bar they are as follows: A patent of the United States is not only a conveyance; it is also the judgment of a quasi-judicial tribunal to which questions relating to the disposition of the public lands are confided that the patentee is entitled to the land. Where the land covered by the patent is land which was within the jurisdiction of the Department (as is the case here) the patent is impervious to collateral attack. It cannot be questioned in any form of action at law, but only by suit in equity by the Government to set aside the patent, or by an individual claimant to have the patentee declared trustee of the legal title for his benefit. In such a suit the patent is conclusive upon all questions of fact, or mixed law and fact, actually decided by the Department or neces-

sarily involved or implied in the determination that the patentee is entitled to the land; and the court will give relief only against errors of law, fraud, and palpable mistake. And where the suit is by an individual claimant it is essential that he should himself have so complied with the law as to be entitled to patent as against the Government. Where the patent title is questioned in a suit of this character, *the burden is upon the party attacking it to controvert, by competent and conclusive evidence, every theory of fact upon which the patent might be sustained. No inferences or presumptions will be indulged adverse to the patent title.* There must be a clear and unequivocal showing of superior right in the plaintiff; and this conclusion cannot be made to depend upon inferences or upon evidence susceptible of a construction which would sustain a judgment for the patentee. The patent imports an adjudication by the Department of the existence of every fact necessary to entitle the patentee to the land; and this adjudication cannot be overthrown save by a clear, conclusive and unequivocal showing of the non-existence of such facts, or of the existence of facts creating a superior right in the plaintiff; and in either case *the burden is upon the plaintiff and must be sustained by him at all points.* And where there is any conflict or uncertainty in the showing, or where conflicting inferences may be drawn from the evidence, although undisputed, the burden is not sustained and the patent will control.

Smelting Co. v. Kemp, 104 U. S., 636, 640, 647,
 Maxwell Land Grant Case, 121 U. S., 325, 379, 381,
 Lee v. Johnson, 116 U. S., 48, 50,
 Steel v. Smelting & Refining Co., 106 U. S., 447,
 450-454.

Bohall v. Dilla, 114 U. S., 47, 51,
 Sparks v. Pierce, 115 U. S., 408, 413,
 Marquez v. Frisbie, 101 U. S., 473, 475,
 Quinby v. Conlan, 104 U. S., 420, 425,
 Whitcomb v. White, 214 U. S., 15,

Ross v. Day, 232 U. S., 110, 116.

Leonard v. Lennox, (C. C. A. 8th Cir.), 181 Fed., 760, 762,

Perhaps the best and most comprehensive statement of these rules to be found in any single case, is that made by Mr. Justice Van Devanter (then Circuit Judge) in Leonard v. Lennox, *supra*; but there is no one case which exhibits the full scope and extent of the rules, and they cannot be fully comprehended and understood without a pretty general reference to the authorities cited above. The rule which is perhaps least well understood is that which relates to questions of *mixed law and fact*. That rule is best illustrated in the cases of Marquez v. Frisbie, Whitcomb v. White, and Ross v. Day, *supra*. In Whitcomb v. White, Mr. Justice Brewer said (and this language is quoted with express approval in Ross v. Day, decided at the last term of the Supreme Court).

"The decision of the Land Department was not rested solely upon the fact that White's formal application was filed a few hours before that of the trustee for the occupants of the townsite, but rather chiefly upon the priority of the former's equitable rights. So far as such decision involves questions of fact it is conclusive upon the courts. Johnson v. Towsley, 13 Wall. 72, 86; Shepley v. Cowan, 91 U. S., 330, 340; Marquez v. Frisbie, 101 U. S., 473, 476; Quinby v. Conlan, 104 U. S., 420, 425, 426; Burfenning v. C., St. P., M. & O. Ry., 163 U. S., 321, 323; De Cambra v. Rogers, 189 U. S., 119, 120. *And this rule is applied in cases where there is a mixed question of law and fact, unless the court is able to so separate the question as to see clearly what and where the mistake of law is.* As said by Mr. Justice Miller in Marquez v. Frisbie, *supra*, p. 476: 'This means, and it is a sound principle, that where there is a mixed question of law and fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive.' "

Now the patent under which the respondents hold amounts to an adjudication by the Department that the Railway Company had succeeded to the rights of the Railroad Company, and as such successor was entitled to make selections under the act of 1899, and that the land selected was of the character subject to selection under the act; that is, that it was land classified as nonmineral within the intent of the statute. Indeed, the patent carries an express adjudication, in terms, that the Railway Company "is the lawful successor in interest" of the Railroad Company, and as such entitled to the land (Record, p. 69).

No attempt whatever, was made by appellant to introduce evidence bearing in any way upon the question of the successorship of the Railway Company; and no evidence was introduced having the slightest tendency to show that the land in question was not affirmatively classified as nonmineral at the time of survey. On the other hand, the decision of the Secretary of the Interior affirming the rejection of appellant's homestead application, which is in evidence in this case and is made part of the record by reference to the reported decision in 37 L. D., 135 (Record, p. 67), contains an express finding with respect to this land in the words, "*The returns made at the time of actual survey classify the same tracts as nonmineral.*"

It seems very plain, therefore, that neither of the questions indicated is open upon the present record. On that record it appears that these questions were questions of fact, or at most questions of mixed law and fact, upon which the decision of the Department is conclusive. It is therefore unnecessary to consider either proposition in its legal aspect. And indeed, if the question were open it might well be submitted on the very thoughtful and scholarly discussion in the opinion of the learned District Judge.

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